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IN THE
Supreme Court of the United States

BELLSOUTH CORPORATION AND
BELLSOUTH TELECOMMUNICATIONS, INC.,
Petitioners,

v.

COVAD COMMUNICATIONS COMPANY AND
DIECA COMMUNICATIONS, INC. D/B/A
COVAD COMMUNICATIONS COMPANY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 20, 2003

QUESTION PRESENTED

Whether allegations that an incumbent local telephone company failed to provide adequate affirmative assistance to competitors, as separately required under the Telecommunications Act of 1996, are sufficient to state a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners BellSouth Corporation and BellSouth Telecommunications, Inc. state the following:

BellSouth Telecommunications, Inc. is a wholly owned subsidiary of BellSouth Corporation, a publicly held corporation. BellSouth Corporation has no parent company, and no publicly owned company owns 10% or more of its stock.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BellSouth Corporation and BellSouth Telecommunications, Inc. (collectively, "BellSouth") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 299 F.3d 1272. The opinion of the district court (Pet. App. 30a-62a) is not reported.

JURISDICTION

The opinion of the court of appeals was entered on August 2, 2002. On December 20, 2002, a petition for panel and *en banc* rehearing was denied. Pet. App. 63a-81a (reported at 314 F.3d 1282). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, along with provisions of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, are set forth at Pet. App. 82a-98a.

STATEMENT

This case presents the same important question concerning the scope of an alleged monopolist's duties under Section 2 of the Sherman Act that is raised in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, No. 02-682, *petition for cert. granted* (Mar. 10, 2003). In their antitrust complaint, respondents Covad Communications Co. and DIECA Communications, Inc. d/b/a Covad Communications Co. (collectively, "Covad") alleged that BellSouth had violated the *antitrust laws* by failing to carry out with sufficient speed and efficiency its *regulatory obligations* under the Telecommunications Act of 1996 (the "1996 Act"). As did the Second Circuit in *Trinko*, the Eleventh Circuit reversed the district court's dismissal of respondents' claims, thus rejecting the holding and the reasoning of the prior decision of the Seventh Circuit in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000).

Because the underlying antitrust merits issues in the two cases are the same, the Court should, at a minimum, hold this petition pending the decision in *Trinko*. This case differs from *Trinko*, however, in one respect. The plaintiff in *Trinko* was a customer of Verizon's customer AT&T. *See Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*, 305 F.3d 89, 94 (2d Cir. 2002). By contrast, Covad is a telecommunications carrier – a *competitor* of BellSouth. If the Court reverses the Second Circuit's decision on the ground that the plaintiff's injury was too indirect to allow it to maintain its suit (*see* Petition for a Writ of Certiorari at 23-24, *Verizon v. Trinko*, No. 02-682 ("Verizon *Trinko* Pet."), the Court might not reach the question that is squarely presented here: that is, whether the allegation that an incumbent telephone company has failed fully to comply with its regulatory obligations

under the 1996 Act states a claim under Section 2. In that event, the Court should grant this petition to resolve the underlying merits issue, a question of extraordinary importance to the telecommunications industry and for the administration of the antitrust laws.

1. The Complaint and Regulatory Background

a. Covad is a provider of high-speed Internet access service using digital subscriber line ("DSL") technology. Compl. ¶¶ 6, 7, 14. BellSouth also provides DSL service. As the D.C. Circuit recently noted, the Federal Communications Commission ("FCC") has confirmed "both the robust competition, and the dominance of cable [modem service], in the [high-speed Internet access] market." *USTA v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002), *petition for cert. pending*, No. 02-858 (U.S. filed Dec. 3, 2002). Thus, BellSouth is neither a monopolist in the market in which Covad seeks to offer service nor even the leading provider of service.

Covad allegedly depends to a significant degree on access to BellSouth's local network infrastructure to provide service. Compl. ¶ 16; *see also id.* ¶¶ 25-28. Prior to 1996, BellSouth had no obligation to accommodate such demands. Then, Congress passed the 1996 Act, which created "something brand new" – "the wholesale market for leasing network elements." *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1681 (2002). That law, as implemented by the FCC, requires incumbent local exchange carriers ("ILECs") – including BellSouth – to surrender pieces of their local networks to competitors. The pieces must be provided, moreover, at low rates based on "cost," a standard implemented through a "novel ratesetting" methodology that produces rates just "short of confiscating the incumbents' property." *Id.* at 1661. These unprecedented regulatory obligations were described by a "leading backer of the [1996] Act in the Senate" as "'extraordinary'" precisely because they told "'private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out.'" *Id.* (quoting 141 Cong. Rec. 15572 (1995) (Sen. Breaux)).

To implement the 1996 Act's requirements, competitors like BellSouth and Covad must negotiate "interconnection agreements" to "fulfill the duties described" in the 1996 Act and the FCC's implementing regulations. 47 U.S.C. § 251(c)(1). If parties are unable to agree to terms, either party may petition the responsible state commission to arbitrate in accordance with the standards set forth in the Act, pursuant to a short statutory deadline for decision. *Id.* § 252(b), (c), (e). Once such agreements are approved, the state commission retains the authority to interpret and enforce them, subject to federal court review. *See Verizon Maryland Inc. v. Public Serv. Comm'n*, 122 S. Ct. 1753, 1759 (2002).[1]

Covad entered into an interconnection agreement with BellSouth in late 1998. Compl. ¶ 30. Since that time, Covad has been ordering, and BellSouth has been providing, network elements under the agreement.

b. Covad brought its antitrust complaint in December 2000. The complaint's allegations center on network facilities that Covad allegedly requires from BellSouth to provide DSL service. These facilities are already available to Covad under the 1996 Act, the FCC's implementing regulations, and enforceable interconnection agreements, and the critical paragraphs of Covad's complaint describe a litany of disputes concerning implementation of those regulatory requirements. Covad has already presented many of the same issues to state and federal regulators, who rejected Covad's claims and

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[1] In the opinion below, the court held that state commissions had no authority to interpret and enforce interconnection agreements and that claims for "breach" of such agreements therefore could be heard in federal district court in the first instance. Pet. App. 27a. That holding conflicted with the decision of every other circuit, as well as the view of the FCC, and the *en banc* court has since overruled it in another case. *See BellSouth Telecomms., Inc. v. MCImetro Access Transmissions Servs., Inc.*, 317 F.3d 1270 (11th Cir. 2003) (*en banc*).

found that BellSouth has fully complied with its obligations under the 1996 Act.[2]

2. Proceedings Below

a. District Court. BellSouth moved to dismiss the complaint; the district court granted the motion in relevant part. Agreeing with the Seventh Circuit's analysis in *Goldwasser*, the court held that Covad's allegations concerning collocation, transport, order processing, loops, and line sharing "clearly represent affirmative duties which are above and beyond the requirements of the Sherman Act." Pet. App. 48a. The court rejected Covad's allegations of a "price squeeze," finding that "there is no allegation that the ILEC set . . . low retail prices for its own DSL services." *Id.* at 50a-51a. The court also found that "the price squeeze allegation . . . clearly reflects duties under the 1996 Act, the Interconnection Agreement, and the prices set by PSCs." *Id.* at 51a.

b. Court of Appeals. The court of appeals reversed. The court began by opining that the 1996 Act does not confer any "immunity from antitrust violation claims" for matters addressed by the Act (Pet. App. 8a-9a) – even though no party had advocated such an immunity. After satisfying itself that the 1996 Act did not "preempt claims under the Sherman Act as a matter of law" (*id.* at 13a), the court thereafter ignored the 1996 Act for purposes of its antitrust analysis.

The court then held that Covad had stated an antitrust claim based on three varieties of "monopoly leveraging," which it defined as the use of "market power in one market to gain market share in another market other than by competitive means." *Id.* at 16a. *First*, the court held that "withhold-

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[2] *See generally* Memorandum Opinion and Order, *Application by BellSouth Corporation, et al., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828 (2002); Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17595 (2002); Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018 (2002).

ing of access to an essential facility without which a competitor cannot enter or compete in a market is a violation of the antitrust laws" under the "well-established 'essential facilities' doctrine." *Id.* at 17a. Based on this expansive statement of the "essential facilities" doctrine – which the court held requires only an allegation of need on the part of the plaintiff and an ability to provide on the part of the defendant – the court brushed aside several limitations on that doctrine imposed by other courts of appeals. Thus, the court held that the "essential facilities" doctrine is not limited to cases of outright denial of access but extends to a mere dispute over the terms of access, even where access has been granted. *Id.* at 19a-21a. The court further held that even "exclusive" occupation of BellSouth's facilities can be required under the "essential facilities" doctrine if such occupation is "temporary" and "only for so long as Covad has a customer." *Id.* at 21a. The court indicated that BellSouth could even be required, under the antitrust laws, to "construct" *new* facilities (such as back-office ordering systems and databases) to facilitate sharing with Covad. *Id.* at 19a, 21a. And the court found nothing objectionable in Covad's attempt to use the antitrust laws "to force BellSouth . . . to alter the nature of its business" (*i.e.*, from a retail provider of services to a wholesale provider of facilities). *Id.* at 19a.

Second, the court held that Covad had also stated a "refusal to deal" claim based on "virtually identical" facts, even though the parties indisputably are engaged in a continuing commercial relationship. *Id.* at 23a-25a. The court acknowledged that Covad had not alleged "that BellSouth has forgone any economic advantage by failing to provide Covad with the accommodations it desires," but the court found the absence of such an allegation unimportant in light of Covad's allegation that BellSouth's conduct "was motivated by its will to monopolize." *Id.* at 23a n.15.

Finally, the court held that Covad's allegation that BellSouth had engaged in a "price squeeze" could survive a motion to dismiss. Citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993), Bell-

South had argued that its above-cost retail prices could not raise any antitrust issue because BellSouth's wholesale prices are set at cost by state regulators applying FCC regulations. Without addressing this argument, the court held that "[w]hether or not BellSouth has any control over the wholesale prices it charges" is a "question[] of fact." Pet. App. 27a.

In an opinion authored by Judge Tjoflat, three judges dissented from the Eleventh Circuit's refusal to rehear the case *en banc*. The dissent would have reversed the panel's decision, which "departs from settled antitrust doctrine, undermines the operation of the 1996 Act, and invites the filing of hundreds of complex cases in the district courts." *Id.* at 81a.[3] "Antitrust doctrine has never required the extensive, court-administered forced-access regime that the panel opinion contemplates in its holding regarding the so-called 'essential facilities' doctrine." *Id.* at 71a. The dissent noted that the panel's "refusal to deal" holding was inconsistent with *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), because "Covad cannot possibly claim that the obligation it seeks to impose . . . serves BellSouth's interests." Pet. App. 75a. Accordingly, any "decision not to share is perfectly legitimate competition on the merits." *Id.* And the dissent rejected the panel's price-squeeze holding as "antithetical to the consumer welfare aims of antitrust law." *Id.* at 77a.

The dissent also explained the devastating institutional consequences of the panel's decision. The "holding makes

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[3] The dissent criticized the panel for its "belabored argument in support of the unexceptional proposition that 'in enacting the 1996 Act, Congress did not explicitly supersede the salience of the antitrust laws in the telecommunications industry,'" calling the argument a "straw man." Pet. App. 78a. After quoting the 1996 Act's savings clause, which preserves the "applicability of the antitrust laws" as they existed before the 1996 Act was adopted, 1996 Act § 601(b)(1), reprinted at 47 U.S.C. § 152 note, the dissent noted that "Congress perceived the 1996 Act as imposing *additional* obligations" "beyond anything required by the antitrust laws." Pet. App. 78a n.22.

the 1996 Act's post-agreement enforcement scheme a nullity" because it encourages competitors to "jettison the regulatory scheme and sue for treble damages in federal court." *Id.* at 75a. And "the panel's holding undermines Congress's efforts to place regulatory authority in the hands of the FCC – an expert agency – rather than the courts." *Id.* at 76a. "[T]he federal courts will be charged with closely monitoring ILEC compliance with the many requirements of . . . interconnection agreements. This was not what Congress envisioned when it replaced Judge Greene" – the district judge who oversaw the AT&T consent decree – "with the FCC." *Id.* at 77a.

REASONS FOR GRANTING THE PETITION

A. The Court Should Hold This Petition Pending Resolution of *Trinko* and Grant the Petition if the Antitrust Merits Issues Are Not Fully Resolved

The Eleventh Circuit decision presents the same important antitrust issues that the Court granted certiorari to review in *Trinko*. Most narrowly, the decision squarely conflicts with the prior decision of the Seventh Circuit in *Goldwasser*. In *Goldwasser*, the plaintiff alleged that the defendant ILEC had violated Section 2 by failing to provide competitors with access to its network facilities as required by the 1996 Act. 222 F.3d at 394-95. The complaint alleged that the ILEC's network constituted an "essential facility" that "competitors are practically and reasonably unable to duplicate" and that the ILEC had "refused to deal with its competitors on just, reasonable, and nondiscriminatory terms." *Id.* at 401. Covad's allegations and legal theories are indistinguishable.

The courts of appeals sharply disagreed, however, over whether such allegations suffice to state a claim under Section 2. The *Goldwasser* court – in an opinion authored by Judge Diane Wood, an antitrust scholar and former antitrust official at the Department of Justice – held that the obligations imposed under the 1996 Act to make network facilities available to rivals "are precisely the kinds of affirmative duties to help one's competitors that . . . do not exist under the unadorned antitrust laws." *Id.* at 399-400. Moreover, the

court held, "[t]his is not the kind of question that requires further development of a factual record" but "was proper for resolution under [Federal] Rule [of Civil Procedure] 12(b)(6)." *Id.* at 401. In direct conflict, the Eleventh Circuit (like the Second Circuit in *Trinko*) reversed the district court's dismissal order, holding that Covad's litany of complaints under the 1996 Act was sufficient to "state a claim under the antitrust laws." Pet. App. 25a.

More broadly, the decision below, like the decision in *Trinko*, "dramatically expands antitrust liability for failure to assist rivals." Brief for the United States and the FTC as Amici Curiae at 8, *Verizon v. Trinko*, No. 02-682 ("U.S. *Trinko* Br.") (criticizing *Trinko*). The decision "endors[es] essential facilities and monopoly leveraging theories that are uncabined by any requirement that the challenged conduct be exclusionary or predatory – *i.e.*, that the refusal not make economic sense *except* as an effort to diminish competition." *Id.* at 9. "That approach improperly trivializes the antitrust laws and encourages litigants to seek antitrust remedies for ordinary commercial and regulatory disputes." *Id.*

The decision below has far-reaching practical implications, threatening "substantial disruption of the telecommunications industry" (*id.*), as uncertainty concerning the scope of carriers' obligations under the antitrust laws undermines regulators' reform efforts and fosters mushrooming litigation. Moreover, as the dissent below recognized, the "aftershocks of the panel opinion will be felt far beyond the telecommunications industry." Pet. App. 80a.

Recognizing the importance of these issues, the Court has already granted certiorari to review them in *Trinko*. Because the underlying antitrust merits issues in the two cases are essentially the same, this case should, at a minimum, be held pending the Court's decision in *Trinko*. *See* U.S. *Trinko* Br. at 19-20 (noting that this case addresses the same basic issue of "the interplay of the Sherman Act and the 1996 Act" as *Trinko*). It is possible, however, that the *Trinko* case will not fully resolve the merits issues presented here. In its Petition in *Trinko*, Verizon argued, based on precedents of this Court

and the law of other circuits, that the Second Circuit erred in holding that a customer's customer had standing to sue under the antitrust laws based on harms that were purely derivative of harm to the defendant's direct customer. *See* Verizon *Trinko* Pet. at 23-24. The Court's rephrasing of the question presented in *Trinko* – which asks simply whether the Second Circuit erred in reinstating the plaintiff's antitrust claim – leaves the antitrust standing issue in the case.

BellSouth therefore respectfully requests that, in the event that *Trinko* is decided on grounds that do not resolve the antitrust issues presented here, the Court grant this petition. Covad is a competitor of BellSouth, and not a competitor's customer, and the merits issues are squarely presented. Moreover, competitors have already filed dozens of antitrust claims against incumbent telephone companies based on allegations that are indistinguishable from Covad's. In the absence of clear guidance, these suits will continue to flood the federal courts. As the dissent below explained, that result would undermine the scheme created by Congress: competitors will continue to have an irresistible incentive to litigate regulatory disputes and breach of contract claims as antitrust actions, bypassing state administrative agencies and embroiling the courts in operational details in a complex and technical area. *See* Pet. App. 75a-77a.

The antitrust merits issues that are presented both in *Trinko* and in this case caused the Solicitor General to file a rare, unsolicited *amicus* brief in support of certiorari in *Trinko*. To the extent the Court's decision in *Trinko* does not put these issues to rest, the Court should grant certiorari in this case.

B. The Eleventh Circuit Decided Several Important Antitrust Issues in Conflict with Prior Circuit Court and Supreme Court Decisions

Like the Second Circuit's decision in *Trinko*, the Eleventh Circuit's decision endorses theories of Section 2 liability that misconstrue this Court's precedents and conflict with sound precedent from other courts of appeals. Notably, while all of Covad's theories depend on some type of affirmative duty to do business with a rival, Covad never alleged that BellSouth

actually *refused* to deal with Covad. Nor could it: Covad entered markets where BellSouth is the incumbent telephone company years ago and has been offering service over network facilities provided by BellSouth ever since. Indeed, the parties have a continuing, complex commercial relationship that requires daily interaction at many operational levels. Rather than allege any refusal to deal, the complaint focuses on supposed inadequacies in BellSouth's performance – operational details concerning speed and cost. Such routine performance disputes have never been subject to antitrust liability.

Just as significant, Covad has not sought to purchase goods and services that BellSouth voluntarily provides to others at market rates. Instead, Covad insists on something that BellSouth never offered (and never would offer) in the absence of a regulatory obligation – provision of unbundled pieces of BellSouth's physical plant, at steep discounts, for a rival (bent on undermining BellSouth in the marketplace) to use as it pleases. To implement these *regulatory* obligations, incumbent telephone companies have been forced to expend billions of dollars for competitors' sole benefit. These are not antitrust duties at all. And the 1996 Act's savings clause – which specifically provides that nothing in the 1996 Act "shall be construed to *modify*, impair, or supersede the applicability of any of the antitrust laws," 1996 Act § 601(b)(1), reprinted at 47 U.S.C. § 152 note (emphasis added) – precludes incorporating such purely regulatory duties into the antitrust laws.

Taken to its logical conclusion, the decision below suggests a theory of strict liability that would authorize treble damages claims under the antitrust laws whenever a rival alleges that a defendant has failed to provide sufficient assistance in dismantling its lawfully obtained market dominance. That conclusion would *penalize* competitive success: any "successful competitor, having been urged to compete," would be "turned upon when he wins." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

In reaching its incorrect decision, the Eleventh Circuit committed at least five basic errors, each of which creates or deepens a split of authority in the circuits, conflicts with precedent of this Court, or both. These holdings merit review.

1. The Eleventh Circuit held that BellSouth's alleged "refusal to deal" with "competitors in the high-speed internet market" had "leverage[d] its clear monopoly in the telecommunications market." Pet. App. 16a. The court indicated, moreover, that such claims could proceed even though "BellSouth may not at present have a monopoly in the high-speed internet market," and even "'if there has not been an attempt to monopolize'" that market. *Id.* (quoting *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979)). The court thus espoused the view that "monopoly leveraging" may constitute a violation of Section 2 even in the absence of any threat to monopolize the "leveraged" market. Indeed, because the court held that *each* of Covad's antitrust theories was a variety of "monopoly leveraging" (Pet. App. 16a), the court's view on this matter infects each of its subsequent rulings. That error is of particular significance in this case because BellSouth has no monopoly power in the market for high-speed Internet access. *See USTA*, 290 F.3d at 428 (noting that the FCC has "repeatedly confirm[ed] both the robust competition, and the dominance of cable [modem service], in the [high-speed Internet access] market").

The Eleventh Circuit's expansive view of monopoly leveraging squarely conflicts with *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 206 (3d Cir. 1992), and *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991).[4] Moreover, as the United States has argued, the

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[4] Two circuits have also adopted a view of "monopoly leveraging" apparently consistent with the view expressed below. *See Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135, 136-38 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989); *Berkey*, 603 F.2d at 276. Other circuits have criticized monopoly leveraging as an independent basis for liability under Section 2. *See Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1359-60 (Fed. Cir. 1999); *Association for*

Eleventh Circuit's formulation is incorrect because it "does not require the monopolist's conduct to be 'exclusionary' or 'predatory' within the meaning of Section 2 jurisprudence." U.S. *Trinko* Br. at 17. Additionally, as this Court has held, Section 2 condemns unilateral conduct "*only* when it actually monopolizes or dangerously threatens to do so." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (emphasis added). The Eleventh Circuit's formulation would make any vertical integration by an enterprise with a legitimate monopoly at one level of production the basis for claim under Section 2, even if the market at the second level of production is competitive. That rule would do nothing to protect consumers, while deterring efficient competitive methods.

2. The Eleventh Circuit's "essential facilities" holding is incorrect for independent reasons as well. This Court has declined to endorse any free-standing "essential facilities" doctrine, contrary to the court's statement below. *Compare* Pet. App. 18a (calling it a doctrine "endorsed" by the Supreme Court) *with AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part) ("this Court has never adopted" the "essential facilities" doctrine). Although the lower court in the *Aspen Skiing* case relied on an "essential facilities" theory in upholding the jury's liability verdict, this Court refused to address that theory and instead asked whether the defendant's refusal to deal constituted predatory conduct under general Section 2 standards. *See Aspen Skiing*, 472 U.S. at 602-05. As the United States argued in urging review of a comparable holding by the Second Circuit in *Trinko*, the Court's approach reflects the principle that, "like other monopolization and attempted monopolization claims, essential facilities claims must at a minimum include some showing of 'exclusionary' or 'predatory' conduct, *i.e.*, that the refusal to share the facility would not make economic sense unless it tended to reduce or eliminate competition." U.S. *Trinko* Br. at 13.

Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984) (per curiam; panel including now-Justice Ginsburg).

As a result, the courts of appeals have adopted a number of limitations on the "essential facilities" doctrine designed to restrict such claims to circumstances where a plausible claim of predatory conduct has been made. The Eleventh Circuit's rejection of those limitations has spawned additional conflicts.

First, the mandate that BellSouth give up pieces of its existing network to its local-market rivals constitutes "something brand new" under the 1996 Act (*Verizon Communications*, 122 S. Ct. at 1681). In *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*, 924 F.2d 539 (4th Cir. 1991), the Fourth Circuit rejected the plaintiff's closely analogous demand that the defendant railroad rent its track, rather than provide freight services. *Id.* at 545. The court held that such access – though technically possible – was not "feasible": "for CSX to rent track, it would alter its relationship to feeder railroads and transform itself into a 'toll collector.' It is not feasible for CSX as a transportation service-provider to grant trackage rights." *Id.* Moreover, contrary to the view of the Eleventh Circuit, a defendant cannot be required to develop costly new systems or deploy new facilities "to satisfy a would-be sharer." 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 773e, at 210 (2d ed. 2002); *accord City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992).

Second, the type of access that Covad demands – exclusive physical occupation of BellSouth's property – is inconsistent with the "essential facilities" doctrine as formulated by other circuit courts. In *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983), the Seventh Circuit upheld a jury verdict on liability in favor of the plaintiff only because the plaintiff had not demanded "preferential access" to the defendant's facilities or asked the defendant to "abandon its facilities." *Id.* at 1133. When Covad purchases network facilities, it gains *exclusive* use of those facilities, which are no longer available to BellSouth for the provision of service to

its own customers. *See Local Competition Order*,[5] 11 FCC Rcd at 15693, ¶ 385; *see also Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (striking down pre-1996 Act physical collocation rules). But, as the Ninth Circuit held, Section 2 has never required a defendant "to cease using its own facility so that [a rival] can begin using it." *City of Vernon*, 955 F.2d at 1366.[6]

Third, in holding that the antitrust laws may impose liability where a plaintiff that has gained access to the desired facility alleges that the terms of access are not "reasonable" (Pet. App. 20a-21a), the Eleventh Circuit split with the Third Circuit. The Third Circuit has squarely held that a plaintiff may not maintain an "essential facilities" claim where the "defendants did not deny [the plaintiff] use of its facility." *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *see also Alaska Airlines*, 948 F.2d at 545 (rejecting "essential facilities" claim where defendants "never refused any of the plaintiffs access"). Moreover, as the United States has argued, the rule of law announced by the Eleventh Circuit is incorrect, because it confuses the

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[5] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002)

[6] It was undisputed below that Covad demanded (and the 1996 Act requires BellSouth to provide) exclusive access to facilities. The Eleventh Circuit suggested that BellSouth could be forced to surrender control of its facilities because Covad's occupation would last "only for so long as Covad has a customer." Pet. App. 21a. But the suggestion that BellSouth may one day regain control of its property (if Covad no longer wants it) simply emphasizes that the Eleventh Circuit read Section 2 to require BellSouth to surrender such control in the first place, in conflict with the rule in the Seventh and Ninth Circuits. *See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (temporary physical occupation is a taking for purposes of the Fifth Amendment).

standards relating to antitrust liability with the "*remedial* requirements this Court addressed in" *United States v. Terminal Railroad Ass'n*, 224 U.S. 383, 410-11 (1912). U.S. *Trinko* Br. at 15 n.4.

3. The Eleventh Circuit also erred by holding that a plaintiff's failure to allege predatory *conduct* could be disregarded and replaced by a conclusory allegation of "monopolistic intent." Pet. App. 23a-24a & n.15; *see also id.* at 14a ("An assessment of intent is critical in determining whether an accused monopolist's actions qualify as anti-competitive conduct."). This ruling conflicts with the rule in at least four circuit courts. *See United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir.) (*en banc*) (per curiam) ("our focus is upon the effect of that conduct, not upon the intent behind it"), *cert. denied*, 534 U.S. 952 (2001); *Rural Tel. Serv. Co. v. Feist Pubs., Inc.*, 957 F.2d 765, 769 (10th Cir. 1992) ("anti-competitive intent alone is insufficient to establish a violation of § 2"); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.) ("if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors ('these turkeys') is irrelevant"); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.); *but see Davis v. Pacific Bell*, 204 F. Supp. 2d 1236, 1242 (N.D. Cal. 2002) (holding subjective intent to be determinative).

The majority rule, which the Eleventh Circuit rejected, is correct. Successful procompetitive conduct hurts competitors; competition properly focuses on winning sales from rivals. Precisely because antitrust law is intended to protect "*competition*, not *competitors*" (*Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)), the unlawfulness of conduct is judged by objectively identifying the likely effect of the type of conduct at issue. "Intent" is relevant only to help identify such general tendencies, not to penalize a firm's efforts to make all the sales it can.

4. The Eleventh Circuit's "price squeeze" ruling is inconsistent with this Court's precedents. Under the 1996 Act, BellSouth is required to provide access to network elements

at prices set by regulators at cost: indeed, this Court upheld an FCC pricing standard that is "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon Communications*, 122 S. Ct. at 1661. Covad did *not* allege that BellSouth engaged in predatory pricing – that is, setting its prices below cost in the hope that it could recoup any losses later through monopoly pricing. Covad instead alleges that BellSouth must raise above-cost retail prices simply to give rivals a greater opportunity to earn a profit. Such a rule would hurt, not help, consumers and conflicts with this Court's holding in *Brooke Group*. *See* 509 U.S. at 223 (rejecting "the notion that above-cost prices that are below . . . the costs of a firm's competitors inflict injury to competition"); *see also N.W.S. Michigan, Inc. v. General Wine & Liquor Co.*, No. 01-1975, 2003 WL 264731, at *2 (6th Cir. Feb. 6, 2003) ("For antitrust claims based on pricing practices, the Supreme Court has adopted a strict antitrust injury rule requiring plaintiffs to allege predatory pricing.").

5. Finally, the Eleventh Circuit failed to take account of the 1996 Act in evaluating Covad's claims under the antitrust laws. That failure – and the panel's focus on an un-argued question of "immunity" (Pet. App. 8a-9a) – departed from well-recognized law giving a regulatory regime like the 1996 Act an important role under "[t]raditional antitrust principles": the regime "dramatically alters the calculus of antitrust harms and benefits." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21, 25 (1st Cir. 1990) (Breyer, J.) (citing cases). As *Goldwasser* held, regulation's role here makes a novel antitrust assistance duty needless *and* inappropriate.

First, the 1996 Act and its implementing regulations guaranteed access "well beyond" anything that the antitrust laws might contemplate, including access at all-but-confiscatory prices well below any market rates. *Goldwasser*, 222 F.3d at 399-400; U.S. *Trinko* Br. at 14 (claim that alleged failure to comply with 1996 Act obligations could be considered predatory "is inherently implausible when measured against the

regulatory scheme"). The 1996 Act, moreover, relies on the expertise and active involvement of both federal and state regulators to implement the newly imposed duties. The FCC has adopted thousands of pages of regulations elaborating the obligations in comprehensive detail. State and federal regulators oversee case-specific implementation through the approval and enforcement of interconnection agreements.

The 1996 Act thus makes clear that there is no significant likelihood of competitive harm – that is, no "more-than temporary harmful effects on *competition*" (*Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 482 (5th Cir. 2000) (internal quotation marks omitted)) or "enduring adverse impact on competition itself" (*American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997)). There is therefore no "need" to extend the antitrust laws to cover Covad's allegations. *See Goldwasser*, 222 F.3d at 400-01.

Second, while the 1996 Act thus eliminates any alleged *benefit* from expanding antitrust law to encompass the duties of assistance at issue, any such expansion would come with serious *negative* consequences traditionally considered in shaping antitrust rules. Those include the risk of *excessive* sharing and disincentives to investment – risks magnified by the prospect of treble-damages liability decided by a jury. They also include compelling institutional concerns.

The allegations in Covad's 240-paragraph complaint involve matters that are also addressed in exhaustive detail by the 1996 Act and thousands of pages of FCC orders and regulations as well as state commission decisions implementing those federal requirements. Covad itself has actively participated in federal and state regulatory proceedings in an effort to influence those regulations and to exploit the opportunities provided. All the accommodations that Covad seeks to impose under the antitrust laws are already required by the FCC under the 1996 Act – or have been specifically rejected. Accordingly, this case involves a plaintiff that is attempting to "'brush[] aside'" the "'elaborate system of negotiated agreements and enforcement established by the 1996 Act.'"

Pet. App. 76a (quoting *Goldwasser*, 222 F.3d at 401). Even the Second Circuit reserved judgment about the viability of such competitor claims. *See Trinko*, 305 F.3d at 112 n.19. Entertaining Covad's claims would effectively transform antitrust courts into regulatory agencies, requiring detailed regulation of the prices and terms of access.

Covad's effort to convert regulatory claims into an antitrust suit led the Georgia Public Service Commission ("PSC") to file an *amicus* brief in the Eleventh Circuit urging affirmance of the district court's decision. The Georgia PSC noted that all of the 1996 Act-related issues raised in Covad's complaint were "issues that the [Georgia PSC] has addressed." Brief of Amicus Curiae Georgia PSC in Support of Appellees at 7 (filed Jan. 29, 2002). In addressing such issues, moreover, the Georgia PSC "not only applies federal law, but also develops a regulatory policy for the State." *Id.* "It would undermine the [Georgia PSC's] efforts towards this end if parties were permitted to initiate complaints in federal court on the same issues." *Id.* at 8.

The threat that the Eleventh Circuit's decision will "undermine[] the operation of the 1996 Act" by "invit[ing] the filing of hundreds of complex cases" (Pet. App. 81a) underscores the urgent need for review of the antitrust merits issues presented here. There are thousands of interconnection agreements, between carriers of opposed economic interest, which produce disputes identical to those raised by Covad on a daily basis. Allowing antitrust claims like Covad's to proceed will encourage new entrants, unable to succeed in the marketplace, to "jettison the regulatory scheme" and to pursue treble damages through the federal courts instead. *Id.* at 75a. "Congress's efforts to place regulatory authority in the hands of the FCC" – and state commissions – will collapse, as federal courts are required to "closely monitor[]" ILECs' compliance with detailed regulatory obligations that will themselves be recast by lay juries applying imprecise standards. *Id.* at 76a, 77a. That is not what Congress intended when it passed the 1996 Act.

CONCLUSION

The Court should hold the petition and, if the *Trinko* decision does not resolve the question presented, grant certiorari.

Respectfully submitted,

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March 20, 2003

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-16064

COVAD COMMUNICATIONS COMPANY,
DIECA COMMUNICATIONS, INC. D/B/A
COVAD COMMUNICATIONS COMPANY,
Plaintiffs-Appellants,

v.

BELLSOUTH CORPORATION,
BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

[August 2, 2002]

Before BARKETT and MARCUS, Circuit Judges, and Highsmith*, District Judge.

BARKETT, Circuit Judge:

Covad Communications Company and Dieca Communications, Inc. (collectively "Covad")[1] appeal the district court's dismissal, pursuant to Federal Rule of Civil Procedure 12(b)(6), of their action against BellSouth Corporation and BellSouth Telecommunications Corporation (collectively "BellSouth"). Covad is a seller of high-speed Digital Sub-

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* Honorable Shelby Highsmith, U.S. District Judge for the Southern District of Florida, sitting by designation.

[1] Dieca is a wholly-owned subsidiary of Covad.

scriber Line ("DSL") internet service. BellSouth is a regional telephone service and telecommunications provider, which also sells DSL service. Covad and BellSouth have entered into an "interconnection agreement" to allow Covad to provide DSL service to consumers over BellSouth's existing telephone lines. However, Covad alleges that BellSouth has attempted to stifle competition both by failing to live up to its contractual obligations and through broad exclusionary behavior, including the use of price squeezes, misleading advertising, and the misuse of Covad's confidential customer information. Covad's 24-count complaint asserts that BellSouth's actions violated the Sherman Antitrust Act, the Telecommunications Act of 1996, state anti-monopoly statutes and unfair competition laws, and state law of breach of contract. On appeal, Covad argues that the trial court erred in dismissing Covad's complaint. We agree and REVERSE.

BACKGROUND

BellSouth is the incumbent local exchange carrier ("ILEC") that inherited monopoly control over the local telephone network in a nine-state region after the breakup of AT&T in 1983. Covad, formed in 1996, sells high speed DSL service, a technology that allows consumers and businesses to transmit and receive data over existing copper phone lines. Covad's DSL service competes directly with BellSouth's own DSL and other retail data services, such as dial-up internet access, Internet Services Digital Network ("ISDN") and dedicated line services such as "Frame Relay" and "T-1."

As Covad explains it,[2] to bring its services to consumers in BellSouth's region, Covad must have dependable, timely, and affordable access to the local telephone network controlled by BellSouth. Because of the ubiquitous nature of the local telephone network, the facilities controlled by Bell-

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[2] Because in this appeal we review *de novo* the district court's grant of a motion to dismiss Covad's complaint, we take the facts as they are alleged in Covad's complaint. *See Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983).

South cannot practicably be duplicated. Thus, to operate feasibly, Covad must be able to "interconnect" its DSL network with BellSouth's local telephone network, which means, at its most basic, that Covad needs to be able to connect its wires to the BellSouth wires that make up the local telephone network.

Congress recognized that new companies seeking entry into the market could not compete if they had to duplicate existing telephone networks, and addressed this concern by passing the Telecommunications Act of 1996 (the "1996 Act"), which requires, among other things, that ILECs allow competitors to interconnect with their networks. The centerpieces of the 1996 Telecommunications Act are sections 251[3] and 252,[4] codified at 47 U.S.C. §§ 251 and 252, which together impose a series of affirmative duties on ILECs like BellSouth, for the benefit of competitive local exchange carriers ("CLECs") like Covad. Sections 251 and 252 also establish the standards for the arbitration and approval of interconnection agreements between ILECs and CLECs.

Pursuant to the 1996 Act, Covad entered into a contract in 1998 with BellSouth (the "Interconnection Agreement") in

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[3] Section 251 imposes various duties on all local exchange carriers ("LECs"): to permit the resale of their telecommunication services; to provide number portability; to provide dialing parity to other LECs; to afford other LECs access to poles, ducts, conduits, and rights-of-way; and, most significantly here, to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b). Section 251 also imposes additional obligation on ILECs, including the duty to interconnect their networks with that of any requesting telecommunications carriers "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory," and to negotiate in good faith the agreements establishing the rates, terms, and conditions of these interconnections. 47 U.S.C. § 251(c)(1) and (2).

[4] Section 252 provides for the negotiation, arbitration, and approval of interconnection agreements and requires all parties to participate in any arbitration. 47 U.S.C. § 252(b)(1) and (5). All interconnection agreements adopted by negotiation or arbitration must be submitted for approval to the respective state public service commission ("PSC"). 47 U.S.C. § 252(e).

which BellSouth agreed, among other things: (1) to allow Covad to "collocate" (place Covad's equipment) in BellSouth central offices throughout its region, providing interconnection between the network controlled by BellSouth and Covad's network; (2) to provide interoffice transport facilities (high capacity connections necessary to connect Covad's equipment in various central offices); (3) to provide nondiscriminatory access to operational support systems ("OSS") to allow Covad to place orders for facilities; and (4) to provide loops (the actual copper wires used for DSL transmission).

In this suit, Covad alleges that BellSouth aimed to stifle competition and protect and extend its local telephone monopoly, in violation of the Interconnection Agreement and the antitrust laws, by embarking on a series of dilatory, anticompetitive acts designed to prevent or delay Covad's entry into the DSL market, impede its ability to deliver service to consumers, and drive Covad from the marketplace. In particular, Covad alleges that BellSouth regularly misrepresented the availability of space in BellSouth's central offices so as initially to effectively deny collocation altogether. When it did permit collocation, BellSouth allegedly raised Covad's costs unnecessarily and systematically and in bad faith denied and delayed facilities essential to Covad's success, including interoffice transport, OSS, and local loops, resulting in delays and lost customers. Covad also asserts that BellSouth manipulated its dual role as both Covad's wholesale supplier (of local exchange elements) and its retail competitor (for DSL) by engaging in a "price squeeze" – an intentional pattern of pricing wholesale inputs at such a high level that Covad (or indeed BellSouth itself) cannot absorb those costs and still compete profitably in the downstream retail markets. By assigning inordinately high costs to its wholesale offerings, and inordinately low costs to its retail offerings, BellSouth allegedly squeezed out competitors such as Covad, clearing the field for its own retail services.

Furthermore, Covad alleges that BellSouth strategically understaffed its wholesale division, which BellSouth created to serve customer-competitors like Covad. This strategy

slowed down order processing and created backlogs that, at times, included over 5,000 Covad orders. By refusing to develop adequate systems for placing wholesale orders, BellSouth thwarted Covad's aggressive first-to-market strategy, caused Covad to lose customers, impeded Covad's ability to deliver high quality service, and protected BellSouth's monopoly.

Finally, Covad alleges that BellSouth acted with clear motive and intent to destroy DSL competition and competitors like Covad. Covad asserts that BellSouth possessed DSL technology, but did not offer it to the public as a means of internet access until forced to do so in competition with Covad; BellSouth preferred to offer more profitable alternatives such as ISDN or T-1 service, at the expense of consumer choice. When Covad threatened to compete for internet access customers with DSL, a cheaper and more convenient service, BellSouth itself began an aggressive campaign to offer DSL. BellSouth confirmed its anticompetitive intent, Covad says, by falsely disparaging Covad's services and using confidential Covad information to solicit its customers. Covad states that BellSouth's scheme has had the intended effect of denying Covad access to the local internet access markets, substantially lessening competition and consumer choice in those markets, creating higher prices, and stifling innovation.

These actions, according to Covad, violate the 1996 Act, the Sherman Act, and various state laws. The district court, relying on the Seventh Circuit's opinion in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir.2000), dismissed Covad's Sherman Act claims, holding that allegations that are based on duties established by the 1996 Act cannot form the basis of a violation of the Sherman Act because (1) "'affirmative duties to help one's competitors . . . do not exist under the unadorned antitrust laws,'" D.C. Opinion at 15 n. 8 (quoting *Goldwasser*, 222 F.3d at 400); (2) "the 'elaborate enforcement structure' of the 1996 Act precludes suits under the Sherman Act for ILEC duties because 'antitrust laws would add nothing to the oversight already available

under the 1996 law,'" *id.* at 15 (quoting *Goldwasser*, 222 F.3d at 400-01); and (3) even if such allegations could be entirely divorced from the 1996 Act context, such claims nonetheless would not constitute "allegations of a freestanding antitrust claim" because "'[t]he elaborate system of negotiated agreements and enforcement established by the 1996 Act'" should not be "'brushed aside by any unsatisfied party with the simple act of filing an antitrust action.'" *Id.* at 16-17 (quoting *Goldwasser*, 222 F.3d at 401).[5]

Turning to Covad's claims under Section 222 of the 1996 Act and for breach of contract, the district court found that, because state commissions have the power not only to approve interconnection agreements "but to later interpret and enforce them as well," "sections 206 and 207 do not grant federal courts jurisdiction . . . when claims directly implicate the regulatory scheme of the 1996 Act," except for the power to review "a determination by a [state commission]." *Id.* at 37-38. Because Covad's claims "relate directly to duties under the 1996 Act or the interconnection agreement, which are to be first reviewed and enforced by the respective [state commissions]," the court dismissed those claims. *Id.* at 38. Finally, the court dismissed Covad's tort claims for interference and unfair competition to the extent they involved any allegation other than "improperly soliciting customers not to enter into contracts with Covad or to breach existing contracts, [and] disparaging Covad's products and services." *Id.* at 40.[6] The trial court rejected the bulk of Covad's tort claims because they "are merely a restated breach of contract

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[5] The district court, however, did not dismiss Covad's antitrust claims in their entirety; it found that allegations that "BellSouth engaged in predatory advertising and promotion" could support an antitrust violation and dismissed these claims only to the extent that they alleged misuse of proprietary information, a subject that is "covered by paragraph 9 of the Interconnection Agreement." D.C. Opinion at 29-31. The court also declined to dismiss Covad's "monopoly leveraging" claim to the extent it was based on conduct "not implicated by the 1996 Act." *Id.* at 33.

[6] The tort claims not dismissed by the district court were subsequently dismissed by stipulation and are not part of this appeal.

claim which the court has already dismissed for the reasons noted above." *Id.*

We review a district court's dismissal of a complaint *de novo*. In particular, "[w]hether specific conduct is anticompetitive is a question of law reviewed *de novo*." *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir.1996). "'[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 953 (11th Cir.1986) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). This Court "must accept the facts pleaded as true and construe them in a light favorable to plaintiffs." *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983). Rule 12(b)(6) dismissals are particularly disfavored in fact-intensive antitrust cases. In *Quality Foods*, which involved claims under sections 1 and 2 of the Sherman Act, this Court stated that "the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." 711 F.2d at 994. "Although authorized by the Federal Rules of Civil Procedure, the liberal rules as to the sufficiency of a complaint make it a rare case in which a motion [to dismiss] should be granted." *St. Joseph's Hosp.*, 795 F.2d at 953 (footnote omitted).

DISCUSSION

I. Sherman Act Claims

We turn first to the question of whether the litany of facts pleaded in Covad's complaint, if taken as true, state a cause of action for the violation of the Sherman Act. Answering this question requires a two-tiered inquiry. First, we must determine whether the 1996 Act's regulation of local telecommunications markets precludes application of the Sherman Act so that a claim based on facts "inextricably linked" to an alleged violation of the 1996 Act can never, as a matter of law, form the basis of an independent Sherman Act claim.

If we conclude that the 1996 Act precludes "inextricably linked" antitrust claims, then our inquiry is at an end. However, if such a claim can stand as an independent Sherman Act claim, then we must determine whether the allegations in Covad's complaint adequately allege a violation of the Sherman Act.

A. Does the 1996 Act Preempt All Sherman Act Claims?

As a general principle, a statute does not automatically limit causes of action under another statute, and conduct that is alleged to violate one statute can also violate another, subjecting the perpetrator to liability for the violation of each. Moreover, the same conduct may support various theories of liability and expose the perpetrator to different types of damages. At the same time, Congress can determine the contours and extent of the remedy for specific conduct it determines to be unlawful and accordingly limit the causes of action for such conduct. While such congressional limitations can be established explicitly, courts have also determined that if two statutes are deemed to be plainly repugnant to each other, then Congress has implicitly limited one or the other. However, we must be mindful that courts should be reluctant to imply a limitation resulting in antitrust immunity. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976). "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963) (footnotes omitted).

The initial question before us in this case is whether Congress intended in the 1996 Act to provide immunity from antitrust violation claims for conduct covered in that Act. We begin by examining the plain language of the 1996 Act to determine whether it expresses any intention to preempt Sherman Act antitrust claims for conduct that is inextricably linked to the 1996 Act. Our examination reveals that, rather than pre-emptive language, Congress specifically and directly stated that the two Acts were intended to be used in tandem

to accomplish the congressional goals served by both acts – namely, the stimulation of competition.[7] Congress explicitly stated – both through a savings clause directed specifically at antitrust enforcement and through an additional general savings clause – that the 1996 Act does not supplant or change the antitrust laws. The 1996 Act provides:

> SAVINGS CLAUSE . . . nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.
>
> NO IMPLIED EFFECT . . . This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments.

Telecommunications Act of 1996, sec. 601(b)(1), (c)(1), § 152 note, 110 Stat. 56, 143 (1996) (emphasis added). Thus, in enacting the 1996 Act, Congress did not explicitly supersede the salience of the antitrust laws in the telecommunications industry.

It is clear that plain repugnancy cannot be found between the 1996 Act and the antitrust laws in view of the 1996 Act's express language reserving the applicability of the antitrust laws. An act that expressly preserves the antitrust laws' applicability and fully subjects anticompetitive activities to them cannot be read to impliedly repeal those laws. We agree with the Second Circuit that the "savings clause unambiguously establishes that there is no 'plain repugnancy' between the Telecommunications Act and the antitrust statutes [and thus] that the Telecommunications Act does not provide an 'implicit immunity' from the antitrust laws.'" *Law Offices of Curtis v. Trinko v. Bell Atl. Corp.*, 294 F.3d

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[7] The purpose of the 1996 Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. 104-458, 1996 WL 46795, at *1 (1996).

307 (2d Cir.2002). We conclude that the plain statutory language is sufficient to end our inquiry on this matter. *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir.2001) ("[W]hen the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete.") (brackets in original) (citations omitted).

However, should there be any doubt that the plain language of the savings clause resolves the issue, we find support for our conclusion in the legislative history surrounding the 1996 Act, reflecting that the President, the Congress, the Department of Justice, and the FCC have emphasized the critical need for the antitrust laws to work in conjunction with the 1996 Act in order to spur competition in the telecommunications industry. For example, the Senate Report analyzing the bill specifically provided: "[T]he provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill." S. Rep. No. 104-23, at 17 (1995) (R2-7-A18). Thus, the savings clause "prevents affected parties from asserting that the bill impliedly preempts other laws." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458, S. Rep. No. 104-230, at 201 (1996) ("Conference Report"). Throughout the legislative record, Congress repeatedly emphasized that ILECs like BellSouth remain subject to antitrust enforcement:

> Antitrust law is synonymous with low prices and consumer protection – and that is exactly what we need in our telecommunications industry. . . . [T]he bill contains an all-important antitrust savings clause which ensures that any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws. . . . And by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers.

142 Cong. Rec. H1145-06 (daily ed. February 1, 1996) (statement of Rep. Conyers).

> The second important antitrust issue in this legislation is the unequivocal antitrust savings clause that explicitly maintains the full force of the antitrust laws in this vital industry. Today we take for granted that the antitrust laws apply to the communications sector. . . . Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation that it fosters, can flourish to benefit consumers and the economy.

142 Cong. Rec. S687-01 (daily ed. February 1, 1996) (statement of Sen. Thurmond).

> I firmly believe that we must rely on the bipartisan principles of antitrust law in order to move as quickly as possible toward competition in all segments of the telecommunications industry, and away from regulation. Relying on antitrust principles is vital to ensure that the free market will work to spur competition and reduce government involvement in the industry.

141 Cong. Rec. S18586-01 (daily ed. December 14, 1995) (statement of Sen. Leahy).

Former President Clinton again emphasized the importance of antitrust enforcement when he signed the 1996 Act into law:

> The Act's emphasis on competition is also reflected in its antitrust savings clause. This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemaking or orders, the antitrust laws continue to apply fully.

Statement by President William J. Clinton upon Signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (February 8, 1996), *reprinted in* 1996 U.S.C.C.A.N. 228-1, 228-3. Thus, both the legislative and executive branches recognized that the antitrust laws would coexist alongside the Act.

Finally, in implementing sections 251 and 252 of the 1996 Act (governing the arbitration for and approval of interconnection agreements between ILECs like BellSouth and CLECs like Covad), the FCC formally acknowledged that its regulations did not provide the "exclusive remedy" for anti-

competitive conduct. First Report and Order, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, ¶ 124, 1996 WL 452885 (Aug. 8, 1996) (R2-7-A174). The FCC emphasized that, in addition to judicial review of arbitrations setting the terms of interconnection agreements, "parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252," *id.*, expressly including private antitrust enforcement: "[W]e clarify . . . that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws." *Id.* at ¶ 129 (R2-7-A175) (footnote omitted).

Thus, in view of the plain statutory language and the legislative pronouncements of the intended coexistence of the antitrust laws and the 1996 Act, we cannot agree with *Goldwasser* to the extent that it is read to say that a Sherman Act antitrust claim cannot be brought as a matter of law on the basis of an allegation of anti-competitive conduct that happens to be "intertwined" with obligations established by the 1996 Act.[8]

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[8] The *Goldwasser* court stated:

> Nevertheless, when one reads the complaint as a whole these allegations appear to be inextricably linked to the claims under the 1996 Act. Even if they were not, such a conclusion would then force us to confront the question whether the procedures established under the 1996 Act for achieving competitive markets are compatible with the procedures that would be used to accomplish the same result under the antitrust laws. In our view, they are not. The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes under the § 252 agreements. The 1996 Act is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field.

Goldwasser, 222 F.3d at 401.

The district court interpreted this language to mean that a Sherman Act antitrust claim cannot ever be brought if it alleges conduct also covered

At the same time, we agree with *Goldwasser* that merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations. Thus, a claim that a defendant failed to live up to its contractual obligations under an agreement made pursuant to the 1996 Act in and of itself will be insufficient to establish an antitrust violation. However, if a plaintiff also pleads facts that, if true, tend to show an anticompetitive purpose to create or maintain a monopoly, then that plaintiff has pleaded an antitrust violation.[9] Because we

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by the 1996 Act. We disagree that *Goldwasser* stands for such a broad proposition, and note that *Goldwasser* tied its conclusion to the specific allegations of the complaint in that case. We do agree, however, with the Second Circuit in *Trinko*, when it concluded that "controlling case law does not support the theory that specific legislation meant to encourage competition necessarily takes precedence over the general antitrust laws," *Trinko*, 294 F.3d at 328 (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973)). The Second Circuit also noted that "[i]t is unlikely that allowing antitrust suits would substantially disrupt the regulatory proceedings mandated by the Telecommunications Act." *Id.* While acknowledging that injunctive relief in such suits may require judicial restraint, the *Trinko* court stated that "[a]warding damages for the willful maintenance of monopoly power would not substantially interfere with the regulatory scheme envisioned by the Telecommunications Act," noting that in some instances, "it is possible that the antitrust laws will be needed to supplement the regulatory scheme" to bring competition to the local phone service markets. *Id.* at 329 (footnote omitted).

[9] In *Goldwasser*, the plaintiff pleaded 20 counts, seventeen of which explicitly cited violations of the 1996 Act. *Goldwasser* then alleged that "[a]ll of these practices . . . violate both § 2 of the Sherman Act, 15 U.S.C. § 2, and the 1996 Act itself." *Goldwasser*, 222 F.3d at 395. None of the charges involved any allegations of anticompetitive intent; rather, the complaint merely asserted that the defendant was a monopolist, and that it had violated the 1996 Act. The Seventh Circuit observed, consistent with what we have said above, that such allegations of mere failure to fulfill obligations under the 1996 Act are insufficient to state a claim under the Sherman Act: "The fundamental fallacy in the plaintiffs' theory is that the duties the 1996 Act imposes on ILECs are coterminous with the duty of a monopolist to refrain from exclusionary practices. They are not." *Id.* at 399. The *Goldwasser* court further observed that there exists no independent duty to help competitors under the antitrust laws. Therefore, "[a] complaint like this one, which takes the form 'X is a monopo-

believe that the 1996 Act does not preempt claims under the Sherman Act as a matter of law, we turn to the question of whether Covad has pleaded a valid antitrust claim.

B. Does Covad's Complaint Sufficiently Allege a Violation of the Sherman Act?

Establishing a Section 2 monopolization violation requires proof of two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *accord Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481-83, 112 S.Ct. 2072, 119 L. Ed.2d 265 (1992). Monopoly power is defined as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). A firm that does not achieve monopoly power may nonetheless violate Section 2 through "attempted monopolization." Proving attempted monopolization requires a showing of: (1) anticompetitive or exclusionary conduct; (2) with specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993). Anticompetitive conduct is "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948), disapproved of on other grounds by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). An assessment of intent is critical in determining whether an accused monopolist's actions qualify as anti-competitive conduct. *Id.* at 106-07, 68 S.Ct. 941; *accord United States v. Colgate & Co.*, 250 U.S. 300, 307, 39

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list; X didn't help its competitors enter the market so that they could challenge its monopoly; the prices I must pay X are therefore still too high' does not state a claim under Section 2." *Id.* at 400.

S.Ct. 465, 63 L.Ed. 992 (1919) (stating that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal").

Covad's Sherman Act claims fall under three different categories of alleged anti-competitive behavior. First, Covad complains that BellSouth denied Covad the use of an "essential facility," namely its network of telephone lines. Although, as Covad recognizes, the antitrust laws in general do not require that firms (including monopolies) affirmatively help their competitors to succeed, there is a narrow exception to this general rule when a monopolist improperly withholds access to an "essential facility" without which a competitor cannot enter or compete in a market. *See, e.g., Consolidated Gas Co. of Fla., Inc. v. City Gas Co. of Fla.*, 880 F.2d 297, 301 (11th Cir.1989) (hereinafter, "*Consolidated Gas I* ").[10] Second, Covad complains about BellSouth's "refusal to deal." Although a party may ordinarily choose freely the companies with which it will conduct business, when a monopolist's refusal to deal is accompanied by the intent to monopolize and the requisite degree of market power, that refusal to deal may violate Section 2. *See, e.g., Mr. Furniture Warehouse, Inc. v. Barclays Am./Commercial, Inc.*, 919 F.2d 1517, 1522 (11th Cir.1990). Third, Covad alleges that BellSouth illegally manipulated its dual role as both Covad's wholesale supplier (of local exchange elements) and its retail competitor (for DSL) by engaging in a "price squeeze." A price squeeze is an intentional pattern of pricing wholesale inputs at such a high level that Covad cannot absorb those costs and still compete profitably in the downstream retail markets. *See, e.g., Cities of Anaheim,*

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[10] *Consolidated Gas I* was reinstated, *en banc*, by 912 F.2d 1262 (11th Cir.1990) "('*Consolidated Gas II* '), which was then vacated and remanded in 499 U.S. 915, 111 S.Ct. 1300, 113 L.Ed.2d 235 (1991), because the parties reached a settlement and the case therefore became moot."

Riverside, Banning, Colton & Azusa, Cal. v. Fed. Energy Regulatory Comm'n, 941 F.2d 1234, 1238 (D.C.Cir.1991). Covad alleges that by assigning inordinately high costs to its wholesale offerings, and inordinately low costs to its retail offerings, BellSouth squeezes out competitors such as Covad, clearing the field for its own retail services.

It is important to recognize that each of these three theories is related to Covad's allegation that BellSouth engages in what is known as "monopoly leveraging." Monopoly leveraging occurs when a firm uses its market power in one market to gain market share in another market other than by competitive means. *See Aquatherm Indus., Inc. v. Fla. Power & Light Co.*, 145 F.3d 1258, 1262 (11th Cir.1998) (citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir.1979) ("[T]he use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, even if there has not been an attempt to monopolize the second market.")). For example, in this case, while BellSouth may not at present have a monopoly in the high-speed internet market, it can attempt to leverage its clear monopoly in the telecommunications market by refusing to deal with or provide essential facilities to competitors in the high-speed internet market. We have previously held that monopoly leveraging can violate Section 2: "[W]hen a party with monopoly power abuses its monopoly power in one market as a means of gaining an unlawful competitive advantage in and monopolizing another market, we have no hesitation to conclude that the Sherman Act prohibits such conduct." *Key Enters. of Del., Inc. v. Venice Hosp.*, 919 F.2d 1550, 1568 (11th Cir.1990), *vacated as moot by* 9 F.3d 893 (11th Cir. 1993). The Supreme Court has also found that a triable question of fact exists on a Section 2 claim where a defendant used its control over one market to gain dominance in another market. *See Eastman Kodak*, 504 U.S. at 482-83, 112 S.Ct. 2072; *see also Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 431 F.2d 334, 339 (5th Cir.1970).[11] Guided by

[11] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth

these basic principles of antitrust law, we consider Covad's three claims sequentially.[12]

1. Essential Facilities

The withholding of access to an essential facility without which a competitor cannot enter or compete in a market is a violation of the antitrust laws. *See Consolidated Gas I*, 880 F.2d at 301. Under the well-established "essential facilities" doctrine, an inference of anticompetitive intent in violation of Section 2 arises upon a showing of four elements: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *See MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.1983). By exercising its control over an essential facility (sometimes called a "bottleneck") to withhold access to that facility, a monopolist can exclude competition. For example, in *Consolidated Gas I*, we found that a massive system of natural gas pipes controlled by the defendant was an essential facility. Control over that bottleneck, the gas pipelines, enabled the defendant to exercise its power in the market to exclude competition. *See Consolidated Gas I*, 880 F.2d at 301. "Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms." *MCI*, 708 F.2d at 1132.

In *MCI*, 708 F.2d at 1133, the Seventh Circuit held that the local telephone network was an essential facility and that

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Circuit decisions handed down prior to the close of business on September 30, 1981.

[12] We stress here that our inquiry is limited by the standard of review appropriate to BellSouth's Rule 12(b)(6) motion. Covad need only have alleged necessary elements of the relevant claims. We are not presented here with deciding, for example, whether telephone lines are in fact essential facilities for providing high-speed internet service, or whether BellSouth in fact had monopolistic intent in performing the alleged anticompetitive conduct. The standard of review at this stage is, of course, different than those at summary judgment or at trial.

AT&T could not deny MCI reasonable access to it. Covad argues that MCI is essentially indistinguishable from the present case, and uses it as a template in stating the elements of its essential facilities claim. First, Covad alleges that BellSouth controls an essential facility, indeed, the same essential facility (local telephone exchange) at issue in *MCI*. *See id.* Second, Covad alleges that it would not be economically feasible "to duplicate Bell's local distribution facilities (involving millions of miles of cable and line to individual homes and businesses), and regulatory authorization could not be obtained for such an uneconomical duplication." *Id.* Third, Covad contends that BellSouth denied interconnections to the essential facilities, and fourth, did so even though the interconnections could have been feasibly provided. *See id.* Finally, Covad maintains that BellSouth's conduct was intended to, and did, leverage BellSouth's local exchange monopoly into the local internet access markets to exclude Covad and to create or preserve BellSouth's monopoly power in the local internet access markets. *See id.*

BellSouth's response to this claim begins with a critique of the essential facilities doctrine itself, explaining that "[e]ssential facilities claims – along with other doctrines that Covad invokes in passing – exist at the fringes of antitrust law." Br. of Appellee at 34 (citing *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995)) ("[T]he essential-facilities line[] has been criticized as having nothing to do with the purposes of antitrust law."). Whatever the merits of this critique, as the Seventh Circuit observed in *Blue Cross*, "[w]e are not authorized to abrogate doctrines that have been endorsed and not yet rejected by the Supreme Court." *Blue Cross*, 65 F.3d at 1413 (citing *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir.1986)).

With regard to the substance of Covad's essential facilities claim, BellSouth responds with three points. First, BellSouth argues that Covad cannot allege the most basic element of an essential facilities claim: the actual denial of access to an essential facility. BellSouth states that Covad conceded

that BellSouth has participated in the interconnection and negotiation/arbitration process, and that BellSouth has provided all of the types of facilities that Covad has sought. According to BellSouth, the dispute is thus restricted to the following matters: the specific terms, timing, and implementation of the interconnection agreement; the alleged "delays" in obtaining collocation space and transport; and the "obstacles" in obtaining loops. BellSouth maintains that these complaints are properly characterized as claims regarding the terms or quality of access under the interconnection agreement, and that none of these claims can amount to an antitrust claim.

Second, BellSouth argues that Covad's claim fails because the essential facilities doctrine never applies where a competitor seeks "preferential access" or asks the owner to "abandon its facilities." Br. of Appellee at 39 (citing *MCI*, 708 F.2d at 1133). BellSouth explains that when Covad purchases an unbundled loop, it gains exclusive use of that loop, and that antitrust laws have never required a monopolist to "cease using its own facility so that [a competitor] can begin using it." *Id.* (quoting *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1366 (9th Cir.1992)).

Third, BellSouth argues that Covad is attempting to use antitrust law not merely to gain access to facilities, but also to force BellSouth to construct new facilities or to alter the nature of its business and become a renter of facilities for competitors to use. BellSouth observes that "[n]o case has suggested that the monopolist must build new capacity to satisfy a would-be sharer." *Id.* at 40 (quoting 3A Areeda & Hovenkamp, Antitrust Law ¶ 773e, at 214). BellSouth characterizes Covad's claim as an attempt to harness the antitrust law to force BellSouth to build new facilities, to develop new software, or to modify existing facilities quickly enough to meet Covad's alleged business needs.

For the most part, these are arguments that must be addressed at a later stage of the proceedings, such as summary judgment or trial. We note that with regard to BellSouth's first point, Section 2 prohibits denial of access to essential

facilities *on reasonable terms*. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir.1991); *City of Vernon*, 955 F.2d at 1367; *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 545 (4th Cir.1991); *accord Del. & Hudson Ry. v. Consol. Rail Corp.*, 902 F.2d 174, 179-80 (2d Cir.1990) ("[i]t is sufficient if the terms of the offer to deal are unreasonable"). The "applicable legal standard" is that "[a]ny company which controls an 'essential facility' or a 'strategic bottleneck' in the market violates the antitrust laws if it fails to make access to that facility available to its competitors *on fair and reasonable terms* that do not disadvantage them." *United States v. AT&T*, 524 F.Supp. 1336, 1352-53 (D.D.C.1981) (emphasis added) (citing *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 411, 32 S.Ct. 507, 56 L.Ed. 810 (1912), and *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), among other cases). As the Supreme Court explained in *Terminal R.R.*, a monopolist must provide access to essential facilities "upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies."[13] 224 U.S. at 411, 32 S.Ct. 507. Whether or not Covad can ultimately prove a violation, its complaint does allege that Bell South sometimes

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[13] BellSouth cites to a number of cases denying essential facilities claims, but those cases are distinguishable from the present case. For example, *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir.1996), affirming summary judgment, involved alleged overcharges under the parties' contract, not denial of access to essential facilities. *Anserphone, Inc. v. Bell Atl. Corp.*, 955 F.Supp. 418, 428-29 (W.D. Pa.1996), found plaintiff's evidence of poor service an insufficient "constructive denial" of access to withstand summary judgment. *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 569 (2d Cir.1990) and *Valet Apt. Servs. Inc. v. Atlanta Journal & Constitution*, 865 F.Supp. 828, 830-31 (N.D.Ga.1994), involved fact-bound disputes about whether and where to place print advertisements.

denied access to its facilities outright and other times denied access on reasonable terms.[14]

As to BellSouth's second argument, we likewise note that the case upon which BellSouth relies, *City of Vernon*, 955 F.2d at 1361, affirmed a summary judgment, not a Rule 12 dismissal. Moreover, *City of Vernon* sought exclusive use of a relative share of defendants' entire electrical transmission facilities. *See id.* at 1364 & nn. 3 & 4. As we understand the claim here, Covad seeks temporary use of an element of the ratepayer-funded local telephone network only for so long as Covad has a customer, after which BellSouth regains full use of the facility (which at all times remains its property). That temporary use seems quite similar to the use of a pipeline in *Consolidated Gas I* and is nothing more than *MCI* found proper. *See MCI*, 708 F.2d at 1132-33. In any case, these are primarily fact issues that reflect upon the feasibility of the requested relief. It would thus be inappropriate to grant dismissal on this basis. Similarly, whether the relief sought would unreasonably require BellSouth to construct new facilities as opposed to granting nondiscriminatory access to existing ones is primarily a question of fact inappropriate for disposition on a motion to dismiss.

Without venturing any opinion on the merits of its specific allegations, we conclude that Covad's complaint satisfies the "exceedingly low" threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim, *Quality Foods*, 711 F.2d at 995, namely, that it must adequately allege that as an integrated telecommunications company with monopoly control, BellSouth attempted to lev-

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[14] BellSouth's argument that the essential facilities claim is really an ordinary breach of contract claim does not support its motion to dismiss. Covad's allegations of anticompetitive conduct can and do "support antitrust liability" at the pleading stage. *Mr. Furniture Warehouse*, 919 F.2d at 1522-23 (monopolist's refusal to deal supports Section 2 claim where it is "designed to have an anticompetitive effect"). Breach of contract and antitrust are not mutually exclusive. *See City of Vernon*, 955 F.2d at 1368.

erage its monopoly power in the high-speed internet market by giving itself preferential access to its essential facilities.

2. Refusal to deal

Covad also claims anticompetitive conduct based on BellSouth's refusal to deal with a competitor or potential competitor. Although a party may ordinarily choose the companies with whom it will conduct business, the existence of a "right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). When a monopolist's refusal to deal is accompanied by the intent to monopolize and the requisite degree of market power, that refusal to deal may violate Section 2. *See Mr. Furniture*, 919 F.2d at 1522 (citing *National Indep. Theatre Exhibitors, Inc. v. Charter Fin. Group, Inc.*, 747 F.2d 1396, 1402 (11th Cir.1984), and *Otter Tail*, 410 U.S. at 377-78, 93 S.Ct. 1022); *accord Lorain Journal Co. v. United States*, 342 U.S. 143, 154, 72 S.Ct. 181, 96 L.Ed. 162 (1951); *Mid-Texas Communications Sys., Inc. v. AT&T Co.*, 615 F.2d 1372, 1387 (5th Cir.1980) (right to refuse to deal is "limited when the company possesses a monopoly because the danger exists that it may use its monopoly position to decrease competition in other markets"). As the Supreme Court has explained, "[i]t is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal." *Eastman Kodak*, 504 U.S. at 483 n. 32, 112 S.Ct. 2072; *accord Aspen*, 472 U.S. at 600-05, 105 S. Ct. 2847 (affirming jury's monopolization finding where monopolist ski resort ended joint marketing program with competitor).

The Seventh Circuit has summarized the Supreme Court's holding in *Aspen* in terms useful to our consideration of the present case:

> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* . . . goes the furthest of any case we know toward imposing (more precisely, allowing a jury to impose) a duty under antitrust law to help a competitor; and as a recent decision by the

> Supreme Court it requires our most careful and respectful consideration. The Aspen Skiing Company owned three of the four mountains that make up the Aspen skiing complex. Aspen Highlands Skiing Corporation owned the fourth. The two companies had offered their customers a joint ticket, usable on all four mountains, and the suit arose because Aspen Skiing Company terminated this cooperative arrangement. The Supreme Court found that for the convenience of customers an owner of a ski mountain in a multi-mountain skiing area normally would want to offer a ski ticket usable on any of the mountains. The joint ticket had originated at a time when there was competition among the different ski mountains at Aspen, and similar tickets were offered at other multi-mountain ski areas. 105 S.Ct. at 2858. In other words, competition required some cooperation among competitors. *Aspen Highlands* is not a conventional monopoly refusal-to-deal case like *Otter Tail* because *Aspen Highlands* was never a customer of Aspen Skiing Company; the skiers are the customers. But it is like the essential-facility cases in that the plaintiff could not compete with the defendant without being able to offer its customers access to the defendant's larger facilities.

Olympia, 797 F.2d at 377.

As we understand it, Covad's refusal-to-deal claim is based on alleged facts that are virtually identical to those supporting its essential facilities claim; that is, Covad simply alleges that BellSouth has refused to deal with Covad with respect to an essential facility, and that this refusal was motivated by monopolistic intent.[15] The claim is thus an amalgam of *Aspen*

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[15] BellSouth argues that Covad's complaint contains no specific allegation that BellSouth has forgone any economic advantage by failing to provide Covad with the accommodations it desires. Although it may be true that there is no specific allegation of this sort, the entire complaint alleges that BellSouth's failure to live up to its contractual duties was motivated by its will to monopolize, and showing that BellSouth has forgone an economic advantage is simply a fact that, if true, would tend to support the contention of monopolistic intent in the fact of a proffered legitimate business justification. Here, on motion to dismiss, there is no proffered legitimate business justification for Covad to refute, so the

and *Otter Tail*, in that Covad is a customer of BellSouth that would like to purchase from BellSouth the right to interconnect with BellSouth's essential facility.

In response, BellSouth argues that *Aspen* is inapposite, because in that case the Court held that the defendant had a duty to continue to deal where *termination* of the relationship would involve a "sacrifice [of] short-run benefits and consumer goodwill" in the interest of excluding a rival and reducing competition. 472 U.S. at 610-11, 105 S.Ct. 2847. BellSouth argues that Covad has never alleged that BellSouth has refused to deal (much less terminated a relationship); rather, BellSouth says, Covad alleged that Covad and BellSouth established a new relationship. We do not find this argument persuasive. In *Aspen*, which involved competitors only (not a competitor-customer relationship), defendant's termination of an existing joint-marketing relationship and accompanying sacrifice of short-term benefits supported the jury's inference of the defendant's anticompetitive intent. *See Aspen*, 472 U.S. at 610-11, 105 S.Ct. 2847. However, those are not prerequisites for a refusal-to-deal claim, and *Aspen* does not say or suggest that they are. Other cases, such as *Otter Tail*, involve a refusal to deal where there has been no prior arrangement, and a vertically integrated monopolist that refuses to deal with a customer to foreclose competition in a second market may violate Section 2. *See Olympia*, 797 F.2d at 376-77. In other words, in *Aspen*, the fact that the defendant had terminated a long-standing and mutually economically beneficial agreement was significant only because it supported the jury's conclusion that the defendant's refusal to deal had been motivated by monopolistic intent rather than legitimate business purpose.

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absence of specific factual allegation is irrelevant. *See, e.g., Eastman Kodak*, 504 U.S. at 483-84, 112 S.Ct. 2072 (ruling on a summary judgment motion and noting that after plaintiff's presentation of evidence of Kodak's exclusionary action with monopolistic intent, Kodak bore the initial burden of presenting evidence of "valid business reasons" to justify its actions).

We note that in *Stein v. Pac. Bell Tel. Co.*, 173 F.Supp.2d 975, 983 (N.D.Cal.2001), the district court held that plaintiff had stated a valid antitrust claim on refusal-to-deal facts similar to those in the present case. In *Stein*, according to the plaintiff, Pacific Bell "entered into these optional and voluntary [1996 Act] agreements and then breached them or proceeded to engage in bad faith conduct in carrying them out, without any business justification and with the intent to destroy its competitors . . . so as to unlawfully maintain its monopoly." *Id.* Citing *Aspen*, the plaintiff claimed that such conduct violated Section 2 of the Sherman Act because Pacific Bell was "attempting to exclude rivals on some basis other than efficiency," thus making its conduct "predatory." *Id.* The *Stein* court held that even accepting *Goldwasser* in its entirety, the plaintiff had stated a valid claim. *Id.* at 983-84 ("*Goldwasser* did not consider whether violations of the 1996 Act, if done in a 'predatory' manner as defined in *Aspen Skiing*, can make up an independent basis for liability under the Sherman Act. The plaintiffs in *Goldwasser* did not allege, as Stein alleges here, that the defendant breached interconnection agreements in bad faith and engaged in other exclusionary practices.").

In essence, BellSouth asks this Court to conclude that it is impossible to find a refusal to deal where the defendant has formed an agreement with the plaintiff, in this case an agreement pursuant to the strictures of the 1996 Act. For the reasons stated above, we conclude that allegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws.[16]

3. Price Squeeze

Covad also alleges that BellSouth manipulated its dual role as both Covad's wholesale supplier (of local exchange

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[16] Again, this case is presented to us on a motion to dismiss. BellSouth's response that it has not *in fact* refused to deal, while an appropriate issue for consideration on motion for summary judgment or at trial, is not open to consideration here.

elements) and its retail competitor (for DSL) by engaging in a "price squeeze." BellSouth argues that Covad's allegations must fail because, as the district court stated, "there is no allegation that [BellSouth] set accompanying low retail prices for its own DSL services." BellSouth argues that in light of the 1996 Act's regulatory scheme, Covad's failure to allege accompanying low retail prices is fatal because BellSouth has no discretion over the prices it charges Covad for unbundled loops and other "inputs" that Covad uses; those charges are set by state commissions after extensive proceedings in accordance with the Act's standards. BellSouth maintains that these rates are not "mere[ly] tariff[ed]" and BellSouth is not free to lower those rates unilaterally. *Compare* Br. of Amici Curiae Competitive Telecommunications Ass'n at 29 n. 11. In addition, BellSouth argues that section 252 provides that all network element rates must be "based on cost," 47 U.S.C. § 252(d)(1); accordingly, Covad's failure to allege that the rates BellSouth charges for its retail DSL service are below cost forecloses Covad's claim. BellSouth argues that antitrust law cannot possibly force a company to raise above-cost retail prices to give competitors a greater margin, because such a rule would hurt, rather than help, consumers. In essence, BellSouth contends that Covad's claim boils down to a complaint that the network element rates set by state commissions are too high. BellSouth further asserts that the appropriate remedy for this complaint is not a collateral antitrust action, but judicial review under Section 252(e)(6).

Covad responds by stating that its complaint in fact did allege that BellSouth's retail prices "are set so low related to its unbundled wholesale loop prices that Covad cannot meet BellSouth's wholesale or retail prices and still make a reasonable return on its investment." More important, Covad maintains, this issue is irrelevant because whether or not there is a price squeeze should not depend on whether retail prices are "too low," but rather on the "squeeze" created by the disparity between the wholesale prices Covad must pay BellSouth upstream and the prices Covad must charge downstream to remain competitive with BellSouth. *See, e.g., City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1176 n. 4

(8th Cir.1982). The presence of an illegal differential, Covad states, is precisely what Covad alleged. Covad also states that commission or other regulation at the wholesale end (or even both ends) of the price squeeze is no defense.

Both sides cite a number of cases in support of these positions,[17] but BellSouth's response to the claim is essentially factual in nature, and therefore it is inappropriate to grant BellSouth's motion to dismiss under Rule 12. Whether or not BellSouth has any control over the wholesale prices it charges, or whether the differential between the wholesale and retail prices is such that Covad and other would-be DSL competitors are squeezed out – these are questions of fact. BellSouth may very well prevail on summary judgment, but for the purposes of the pleading stage, Covad's complaint states a claim under antitrust law.

II. Breach of Contract Claims

The district court dismissed Covad's breach of contract claims for lack of jurisdiction, finding that they must first be presented to PSCs. This Court, however, recently held that "state commissions . . . are not authorized under section 252 to interpret interconnection agreements" at all. *Bellsouth Telecomm., Inc. v. MCImetro Access Transmission Servs. Inc.*, 278 F.3d 1223, 1237 (11th Cir.2002). BellSouth

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[17] BellSouth cites *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) (rejecting "the notion that above-cost prices that are below . . . the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws"); *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 978-79 (6th Cir.2000) (plaintiff "ha[s] no statutory right to compete in the economic marketplace on [its] own terms and in such a manner as to accumulate expected profits"). *Compare* Br. of Amici Curiae Competitive Telecomm. Ass'n at 29 n. 11 (arguing that BellSouth should have raised retail prices to protect competitors).

Covad responds with *City of Kirkwood*, 671 F.2d at 1179, and *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271, 279, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976) ("When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves.") (citation omitted).

concedes that the trial court's reasoning is "inconsistent with *Bellsouth v. MCImetro*." In light of *MCImetro*, the trial court's dismissal for lack of jurisdiction must be reversed.

III. The 1996 Act Claim

The trial court dismissed Covad's 1996 Act claim because it found any claims "relate[d] directly to duties under the 1996 Act" must be submitted to PSCs. R3-25-38. For the same reasons that apply to Covad's breach of contract claims, this ruling is inconsistent with *MCImetro* and must be reversed.

IV. State Law Claims

The trial court concluded that Covad's state tort law claims were "preempted by the 1996 Act." This holding is irreconcilable with the Act's express "No Implied Effect" clause, which set forth Congress' intent not to "modify, impair, or supercede Federal, State or local laws." Telecommunications Act of 1996, sec. 601(c)(1), § 152 note, 110 Stat. 56, 143 (1996).

BellSouth does not attempt to defend the trial court's ruling, but argues instead that Covad has failed to plead any tort claims, asserting that conduct that constitutes a breach of contract can never support an interference claim. The cases BellSouth cites, *St. Mary's Hosp. of Athens, Inc. v. Radiology Prof'l Corp.*, 205 Ga.App. 121, 421 S.E.2d 731, 735 (1992), and *International Telecomm. Exch. Corp. v. MCI Telecomms. Corp.*, 892 F.Supp. 1520, 1543 n. 19 (N.D.Ga.1995), do not support that broad proposition. Rather, they were summary judgment cases where plaintiffs had failed to produce evidence that the defendant had actually induced any third party not to contract with the plaintiff. At the Rule 12 stage, the only proper inquiry is whether Covad has alleged such direct interference. It has, in claiming that BellSouth "interfered with Covad's existing and prospective business relations with customers." Therefore, the dismissal of Covad's tort claims must also be reversed.

CONCLUSION

For the reasons stated above, the decision of the district court granting BellSouth's motion to dismiss is REVERSED, and the case is REMANDED for further proceedings in light of this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:00-CV-3414-BBM

COVAD COMMUNICATIONS COMPANY AND
DIECA COMMUNICATIONS, INC. D/B/A
COVAD COMMUNICATIONS COMPANY,
Plaintiffs,

v.

BELLSOUTH CORPORATION AND
BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendants.

[July 6, 2001]

ORDER

This action alleging, *inter alia*, violations of the Sherman Act, is currently before the court on the defendants' motion to file excess page limitations [Doc. No. 5-1] and motion to dismiss [Doc No. 6-1].

Factual Procedural Background

Plaintiff Covad Communications Company ("Covad"), is a California corporation with its principal place of business in Santa Clara, California. Co-plaintiff Dieca Communications, Inc. is a Virginia corporation with its principal place of business in Santa Clara, California and is a wholly owned subsidiary of Covad.[1] Covad, founded in 1996, is in the

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[1] For convenience, the two plaintiffs will be hereinafter referred to collectively as "Covad."

business of selling high speed internet Digital Subscriber Line ("DSL") services. DSL transmits signals over existing copper telephone wires at least ten times faster than dial-up modems, while also leaving the line free for regular telephone use. The technology works by attaching special hardware to both the user and switch ends of a telephone line. Covad's DSL services offer consumers the advantage of paying a flat monthly fee at a low rate.

The defendants, BellSouth Corporation and BellSouth Telecommunications Corporation (hereinafter collectively "BellSouth"), are Georgia corporations with their principal places of business in Atlanta, Georgia. BellSouth is one of the Regional Bell Operating Companies that was divested from AT&T in 1983 and is permitted to provide local exchange services throughout a specified region of the country which comprises all or significant parts of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. BellSouth also offers DSL services under its own brand.

Much of this case, and the relationship between the parties, centers around the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151 *et seq*. ("1996 Act"). The 1996 Act revolutionized the telecommunications industry by fostering competition to all aspects of the telecommunications market in the United States, including local telephone markets. Under the 1996 Act, as discussed below, BellSouth was required as an incumbent local exchange carrier ("ILEC"), to perform certain duties to achieve the goal of greater competition in local telephone markets. Most of these duties concern the use and access of BellSouth's local exchange facilities to competitors who intend to enter local telephone markets. Because DSL technology depends on existing local telephone lines, Covad states that DSL competitors must have dependable, timely and affordable access to the network that an ILEC such as BellSouth controls.

In 1998, Covad, as a prospective competitive local exchange carrier ("CLEC"), entered into an interconnection

agreement with BellSouth, which provided that BellSouth would, among other things: (1) allow Covad to collocate in BellSouth central offices;[2] (2) provide interoffice transport facilities;[3] (3) provide nondiscriminatory access to operational support systems to allow Covad to place orders for facilities; and (4) obtain local loops.[4] In August 1998, pursuant to the interconnection agreement, Covad attempted to enter the BellSouth region by applying for collocation in BellSouth central offices. Covad alleges that BellSouth regularly misrepresented the availability of space in those offices so as to deny collocation altogether, and otherwise raised Covad's costs when it did permit collocation. Covad states that BellSouth also severely delayed Covad's application for collocation by months and sometimes more than a year. Moreover, even after Covad obtained collocation, Covad alleges that BellSouth systematically denied and delayed facilities essential to Covad's success, including interoffice transport, operation support systems, and local loops. Covad also states that by strategically understaffing its wholesale divisions and refusing to develop electronic systems for placing orders, BellSouth thwarted Covad's aggressive first-to-market strategy, caused Covad to lose customers, and devastated Covad's ability to deliver high quality service.

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[2] A "central office" houses the telephone company's switching equipment, and is the point where customer lines are connected to the network, and the network's switches are connected to each other. "Collocate" means placing equipment in central offices to provide interconnection between an ILEC's local telephone network (like BellSouth) and a competitor's network (such as Covad).

[3] "Interoffice transport facilities" means high capacity connections necessary to connect Covad's equipment in various central offices.

[4] "Local loops" are the actual copper wires used for telephone and DSL transmissions. The loops provide a user with access to the global telecommunications infrastructure that is installed all over the world. DSL uses whatever frequencies will propagate on this line for purposes of digital data transmission. These loops are also known as Unbundled Network Elements ("UNEs").

Finally, Covad accuses BellSouth of several other instances of exclusionary behavior, including price squeezes, intentionally misleading advertising designed to take customers away from Covad, and using confidential customer information possessed by Covad to persuade Covad customers to change from Covad DSL services to BellSouth DSL.

On December 22, 2000, Covad filed suit against BellSouth, alleging jurisdiction under both 28 U.S.C. §§ 1331 and 1332. The complaint contains some twenty-four causes of action, including: three counts of violating the Sherman Act, twelve counts of monopolization under the laws of Alabama, Florida, Kentucky, Louisiana, North Carolina and Tennessee, seven counts of interference with business relations or unfair competition under the laws of Alabama, Florida, Georgia, Kentucky, Louisiana, North Carolina, and Tennessee, one count of violating the 1996 Act, and one count for breach of contract under Georgia law.

On February 5, 2001, BellSouth moved to dismiss all the counts in the complaint pursuant to Fed. R. Civ. P. 12(b)(1), (3) and (6). Specifically, the defendants move to dismiss counts 1, 2, 3, 6, 7, 9, 10, 13, 14, 16, 17, 19, 20, 22, and 23 under Rule 12(b)(6) because the defendants contend that failing to perform duties under the 1996 Act are not cognizable as antitrust violations under either federal or state law. The defendants also move to dismiss counts 4 and 5 under Rule 12(b)(1) on the grounds that state public utility commissions have exclusive jurisdiction over interconnection agreements. Further, the defendants move to dismiss counts 8, 11, 12, 15, 21, and 24 under Rule 12(b)(3) and (6) on the contention that Georgia law is the only applicable law available for interference of business relations in this case because of a choice of law provision in the contract, and that BellSouth cannot be liable under an interference tort on the facts alleged. Finally, the defendants seek to dismiss count 18 under Rule 12(b)(6) on the grounds that Louisiana unfair trade practices law specifically exempts any activity subject to the state public service commission. On June 26, 2001, the court heard oral

arguments on the motion to dismiss and advised the parties that a written order would follow.

Motion to Dismiss

BellSouth has moved to dismiss on the grounds of failure to state a claim, lack of subject matter jurisdiction and improper venue. The court first discusses the applicable standards of review.

I. *Standard of Review*

A. *Rule 12(b)(6)*

A complaint should be dismissed under Rule 12(b)(6) only where it appears beyond doubt that no set of facts could support the plaintiff's claims for relief. Fed. R. Civ. P. 12(b)(6); *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir. 1992). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983). Notice pleading is all that is required for a valid complaint. *Lombard's, Inc. v. Prince Mfg.*, 753 F.2d 974, 975 (11th Cir. 1985). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *Id.*

To establish a prima facie case for claims under antitrust law, "enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified. Conclusory allegations that defendant violated the antitrust laws and plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief." *Quality Foods*, 711 F.2d at 995. "However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent." *Id.* (citations omitted). "Thus, to avoid defendants' motion to dismiss plaintiffs must have pleaded enough data so that each element of the alleged antitrust violations can be properly identified, and which data, if accepted as true, satisfy these elements." *Valet Apartment Servs., Inc. v. Atlanta Journal*

and Constitution, 865 F. Supp. 828, 831 (N.D. Ga. 1994), *aff'd mem.*, 505 F.3d 1039 (11th Cir. 1995).

B. *Rule 12(b)(1)*

"If a district court lacks subject matter jurisdiction over a claim, that claim cannot provide a basis for imposing liability, and it necessarily follows that the claim states no violation of federal law." *Wascura v. Carver*, 169 F.3d 683, 685 (11th Cir. 1999). "[P]arties cannot waive subject matter jurisdiction, and [the court] may consider subject matter jurisdiction at any time during [the] litigation." *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000). "Attacks on subject matter jurisdiction come in two forms: (1) facial attacks, and (2) factual attacks." *Id.* (citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)).

Facial attacks on a complaint "require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in [plaintiff's] complaint are taken as true for the purposes of the motion." *Lawrence*, 919 F.2d at 1529. Factual attacks challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.* In a factual attack, the presumption of truthfulness afforded a plaintiff under Fed. R. Civ. P. 12(b)(6) does not attach, and the court is free to weigh the evidence. *See id.*; *see also Scarfo*, 175 F.3d at 960-61. However, "[w]hen the jurisdictional basis of a claim is intertwined with the merits, the district court should apply a Rule 56 summary judgment standard when ruling on a motion to dismiss which asserts a factual attack on subject matter jurisdiction." *Lawrence*, 919 F.2d at 1530. In this case, because the defendants have made a facial attack upon the complaint and have not attempted to present any factual evidence from outside the complaint to the court, the motion to dismiss will be reviewed under the same standards as a Rule 12(b)(6) motion.

C. *Rule 12(b)(3)*

"[M]otions to dismiss upon the basis of choice-of-forum and choice-of-law clauses are properly brought pursuant to Fed. R. Civ. P. 12(b)(3) as motions to dismiss for improper venue." *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998), *cert. denied*, 595 U.S. 1093 (1999). For defenses raised under Rule 12(b)(3), the court may consider matters outside the pleadings if presented in proper form by the parties. *See, e.g.*, 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1364 (2d ed. 1990). In a case such as this, where the parties have not presented additional material to the court, the motion is analyzed under the same standards as a motion to dismiss under Rule 12(b)(6).

II. *Claims under the Sherman Act*

The plaintiffs have brought three counts under Section 2 of the Sherman Act, Count 1: essential facilities doctrine, Count 2: monopolization and Count 3: attempted monopolization. Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." Section 2 thus proscribes three offenses: monopolization (or "actual" monopolization), attempted monopolization, and conspiracy to monopolize. Only the first two offenses are at issue in this case.[5]

The offense of monopolization has two elements: "'(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *United States v. Microsoft*, No. 00-5212 consolidated with 00-5213, 2001 U.S. App. LEXIS 14324, at *20 (D.C.

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[5] Although Covad pleads denial of "essential facilities" as a separate count in the complaint, this activity is actually a form of exclusionary conduct that falls within monopolization.

Cir. June 28, 2001) (per curiam) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).[6] "To establish a [Section] 2 violation for attempted monopolization, 'a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'"[7] *Microsoft*, 2001 U.S. App. LEXIS 14324, at *111 (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)); *Retina Assocs., P.A. v. Southern Baptist Hosp. of Fla., Inc.*, 105 F.3d 1376, 1384 (11th Cir. 1997).

Through these counts, Covad alleges essentially five theories of exclusionary or anticompetitive conduct: (1) refusal to deal; (2) denial of essential facilities; (3) predatory price squeezes; (4) predatory advertising and promotion; and (5)

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[6] The District of Columbia Circuit in the *Microsoft* case recently noted the definition of "monopoly power":

> While merely possessing monopoly power is not itself an antitrust violation, it is a necessary element of a monopolization charge. The Supreme Court defines monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear. Because such direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power. Under this structural approach, monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers. "Entry barriers" are factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level.

Microsoft, 2001 U.S. App. LEXIS 14324, at *21-23 (citations omitted).

[7] Covad has sufficiently pled the specific intent requirement for attempted monopolization. In later discussing the different categories of exclusionary conduct, the alleged conduct will also apply for attempted monopolization, except for the conduct of monopoly leveraging. The court will not further discuss the specific intent required of attempted monopolization, or consider attempted monopolization in a separate section.

monopoly leveraging. These theories contain their own definitions and elements. However, because Covad's allegations surrounding BellSouth's refusal to deal concern only a denial of essential facilities, these two theories will be considered together. Before turning to these categories of exclusionary conduct, the court first considers BellSouth's arguments surrounding the preclusive effect of the 1996 Act on antitrust claims.

B. *The 1996 Act and the Effect of Goldwasser*

As noted above, the 1996 Act represents a comprehensive effort by Congress to bring the benefits of deregulation and competition to all aspects of the telecommunications market in the United States, including especially local markets. The Act was designed to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Preamble to Telecommunications Act of 1996.

Two sections of the 1996 Act are of central importance in this case: 47 U.S.C. §§ 251 and 252. The sections are both contained in Part II of the statute, which is entitled "Development of Competitive Markets." Section 251 sets out detailed rules that implement the general duty of telecommunications carriers (as established in the statute) to interconnect with one another's facilities and equipment. Each local exchange carrier ("LEC"), has the duty (1) to resell on reasonable and nondiscriminatory terms; (2) to provide number portability to the extent technically feasible; (3) to provide dialing parity to competing providers; (4) to afford access to rights-of-way; and (5) to establish reciprocal compensation arrangements for the transport and termination of telecommunications. *See id.* § 251(b).

Incumbent LECs, or ILECs, have additional duties under the statute, which are spelled out in section 251(c). ILECs are required to: (1) negotiate in good faith to create the agreements necessary for fulfilling the subpart (b) duties; (2) provide for "requesting telecommunications carriers" appro-

priate interconnections; (3) provide unbundled access to network elements at any technically feasible point on just, reasonable and nondiscriminatory terms; (4) offer to aspiring competitors at wholesale rates any services that they sell at retail; and (5) give reasonable public notice of changes in their services that would affect others. *See id.* § 251(c).

ILECs and competitive local exchange carriers, or CLECs, must attempt to negotiate the terms of interconnection and resale. *See id.* §§ 251(c)(1) and 252(a). If the parties cannot reach an agreement, any party may request arbitration, and the parties are required to participate. *See id.* § 252(b)(1) and (5). All interconnection agreements adopted by negotiation or arbitration must be submitted for approval to the respective state public service commission ("PSC"). *See id.* § 252(e). Parties may appeal any state PSC decision under the 1996 Act to federal district court. *See id.* § 252(e)(6).

The 1996 Act also contains specific language about its relation to the federal antitrust laws. Section 601(b)(1), found at 47 U.S.C.A. § 152 Historical and Statutory Notes, provides that ". . . nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." To similar effect, section 601(c)(1) states that "this Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."

Before July 2000, few district courts addressed the issue of the applicability of antitrust law on ILECs' duties under the 1996 *Act, see, e.g., Covad Communications Co. v. Pacific Bell Co.*, No. C 98-1887 SI (N.D. Cal. Dec. 14, 1999) (denying ILEC's motion to dismiss claims under the Sherman Act), and no circuit court of appeals had spoken on the issue. However, almost one year ago, the Seventh Circuit in the case of *Goldwasser v. Ameritech Corporation*, 222 F.3d 390 (7th Cir. 2000) addressed the matter and found in favor of an ILEC alleged to have violated the Sherman Act by failing to perform duties under the 1996 Act.

Goldwasser involved a class of consumers of local telephone service suing Ameritech, which like BellSouth, was an ILEC and subject to extended duties to deal with competitors as detailed in section 251(c) of the 1996 Act. The plaintiffs alleged that Ameritech controlled more than 90% of the markets for local telephone service and controlled "essential facilities" that competitors could not duplicate. The plaintiffs also alleged that by "erect[ing] substantial barriers" and "engaging in a host of exclusionary practices made possible by its monopoly power," Ameritech was preventing competitors from entering the market. The plaintiffs listed twenty specific instances of allegedly exclusionary conduct by Ameritech. The plaintiffs alleged that Ameritech had violated both Section 2 of the Sherman Act and sections 206 and 207 of the 1996 Act.

The court noted that the plaintiffs' complaint "focuses tightly on the ILEC's section 251 duties" and all instances of illegal conduct alleged by the plaintiff were violations of duties arising under the 1996 Act. *Id.* at 394, 399-400. The court also found that although the 1996 Act contains an antitrust savings clause, the "elaborate enforcement structure" of the 1996 Act precludes suits under the Sherman Act for ILEC duties because "antitrust laws would add nothing to the oversight already available under the 1996 law."[8] *Id.* at 400-01. The court ultimately held that the 1996 Act "imposes duties on ILECs that are not found in the antitrust laws. Those duties do not conflict with the antitrust laws either, they are

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[8] The court noted:

> . . . Congress could have chosen a simple antitrust solution to the problem of restricted competition in local telephone markets. It did not. Instead, in an effort to jump-start the development of competitive local markets, it imposed a host of special duties on the ILECs; it entrusted supervision of those duties to the FCC and the state public utility commissions; and it created a system of negotiated agreements through which this would be accomplished. These are precisely the kinds of affirmative duties to help one's competitors that we have already noted do not exist under the unadorned antitrust laws.

Goldwasser, 222 F.3d at 399-400.

simply more specific and far-reaching obligations that Congress believed would accelerate the development of competitive markets."[9] *Id.* at 401. Finally, the court examined if the plaintiffs had alleged any facts that could "be divorced from its 1996 Act context such that it states a freestanding antitrust claim for Rule 12(b)(6) purposes." *Id.* at 401. Finding no allegations of a freestanding antitrust claim, the court affirmed the dismissal of the counts under the Sherman Act for failure to state a claim. The court stated:

> It is true that paragraph 37 of the complaint asserts that Ameritech "dominates and controls an essential facility, which consists of its telephone lines, equipment, and transmission and interconnection stations in the relevant

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[9] The court explained:

> It is not our task to assess the wisdom of the particular measures Congress thought would be helpful in [the 1996 Act] process. We have only to recognize that the duties to which plaintiffs refer in paragraphs (1) through (20) of their complaint, which we have set out earlier, go well beyond anything the antitrust laws would mandate on their own. A complaint like this one, which takes the form "X is a monopolist; X didn't help its competitors enter the market so that they could challenge its monopoly; the prices I must pay X are therefore still too high" does not state a claim under Section 2. The reason is because the antitrust laws do not impose that kind of affirmative duty, even on monopolists.
>
> To the extent such a duty exists, as the complaint itself makes clear, it comes from the 1996 Act. We think it both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws. It is illogical because there are countless laws that a firm with market power might violate that have little or nothing to do with its position in the market: an agricultural firm might fail to comply with safety or cleanliness standards applicable to food processing; a computer processor firm might violate employment discrimination laws; a pharmaceutical firm might run afoul of the Food and Drug Administration's rules for approval of new drugs. Even if, in some indirect way, those defalcations helped the firm to maintain its monopoly, the link is too indirect to support an antitrust claim. Those other statutory regimes contain their own penalty structures, and that is the proper way to address any violations.

Goldwasser, 222 F.3d at 400.

> market," and paragraph 38 asserts that Ameritech's competitors are practically and reasonably unable to duplicate those essential facilities. The complaint also alleges that Ameritech has refused to deal with its competitors on just, reasonable, and nondiscriminatory terms. Nevertheless, when one reads the complaint as a whole these allegations appear to be inextricably linked to the claims under the 1996 Act. Even if they were not, such a conclusion would then force us to confront the question whether the procedures established under the 1996 Act for achieving competitive markets are compatible with the procedures that would be used to accomplish the same result under the antitrust laws. In our view, they are not. The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes under the sec. 252 agreements. The 1996 Act is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field.

Id. at 401.

In the wake of *Goldwasser*, several district courts, including district courts in the Eleventh Circuit, have addressed similar suits and applied the facts and interpretations of *Goldwasser* with varying results.[10] For example, the two

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[10] *See, e.g., Building Communications v. Ameritech Servs., Inc.*, No. 97-CV-76336 (E.D. Mich. June 21, 1999); *Supra Telecomm. & Info Sys., Inc. v. BellSouth Telecomm., Inc.*, No. 99-1706-CIV (S.D. Fla. June 8, 2001) (Seitz, J.) (hereinafter *Supra*); *MGC Communications, Inc. v. BellSouth Telecomm., Inc.*, No. 00-2808-CIV (S.D. Fla. May 17, 2001) (Gold, J.) (hereinafter *MGC*); *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, No. 00 Civ. 1910, 2000 WL 1800653 (S.D.N.Y. April 26, 2001) (hereinafter *Trinko*); *Stein v. Pacific Bell Co.*, No. C 00-2915 SI (N.D. Cal. Feb. 14, 2001); *Intermedia Communications, Inc. v. BellSouth Telecomm., Inc.*, No. 8:00-Civ-1410-T-24 (M.D. Fla. Dec. 15, 2000) (Bucklew, J.) (appeal filed) (hereinafter *Intermedia*); *MGC Communications, Inc. v. Sprint Corp.*, No. CV-S-00-0948-PMP (D. Nev. Dec. 12,

Southern District of Florida cases of *Supra* and *MGC* considered claims and facts alleged similar to those in *Goldwasser* and dismissed federal and state antitrust claims on the grounds noted in *Goldwasser*. In those cases, the plaintiffs alleged that the defendant (which was BellSouth in both actions) engaged in exclusionary conduct by denying the plaintiffs, among other things: (1) reasonable access to essential databases and operations support systems; (2) reasonable access to UNE combos; (3) parity with respect to access and portability of telephone numbers; and (4) other essential facilities necessary to provide telecommunications systems. The courts found that the alleged exclusionary activities all fell within the duties noted in the 1996 Act, and relying on *Goldwasser*, dismissed all federal and state antitrust claims. The district courts in *Intermedia* and *Trinko* also reached similar results and dismissed claims arising under the Sherman Act. The decision in *Intermedia*, a Middle District of Florida case, is currently on appeal to the Eleventh Circuit.

In contrast to *Supra*, *MGC*, *Intermedia* and *Trinko*, the courts in *Stein*, *Electronet* and *Sprint* reached different results. In *Stein*, the court, as in *Goldwasser*, dismissed the plaintiffs' Sherman Act claims for denying essential facilities. The court also dismissed antitrust claims for monopoly leveraging. However, the court denied the motion to dismiss claims of attempted monopolization through breaching the interconnection agreement. The court noted that the *Goldwasser* court did not consider "whether violations of the 1996 Act, if done in a 'predatory' manner . . . can make up an independent basis for liability under the Sherman Act. The plaintiffs in *Goldwasser* did not allege, as [the plaintiffs] allege here, that the defendant breached interconnection agreements in bad faith and engaged in other exclusionary practices." *Stein*, No. C 00-2915 Slip. 10. Thus, the court concluded that the plaintiffs "alleged the type of conduct that

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2000) (hereinafter *Sprint*); *Electronet Intermedia Consulting, Inc. v. Sprint-Fla.*, Inc., No. 4:00-CV-0176-RH (N.D. Fla. Sept. 20, 2000) (Hinkle, J.) (hereinafter *Electronet*).

exceeds a monopolist's right to deal or not to deal with competitors, in violation of Section 2 of the Sheraton Act." *Id.*

In *Electronet* and *Sprint*, the courts denied the defendant ILECs' motions to dismiss, but provided little written analysis or reasons why the motions were denied. In *Electronet*, a Northern District of Florida case, the court provided analysis in granting a motion to dismiss for claims arising under sections 251 and 252 of the 1996 Act itself. However, the court only briefly noted claims under the Sherman Act by stating "these are all theories under which Electronet could recover on an appropriate factual showing." A footnote in the order also referred to *Goldwasser*: "It is true, as [the defendant] notes, that a violation of the [1996 Act], without more, does not an antitrust violation make. In the case at bar, however, unlike in *Goldwasser*, there are allegations of misconduct separate and apart from any alleged violations of the [1996 Act]." *Electronet*, No. 4:00cv0176-RH p.2, n.1. Similarly, the court in *Sprint* summarily denied the motions to dismiss antitrust claims and provided no written analysis or reasons why the motion was denied.

The court now turns to Covad's antitrust claims and allegations of exclusionary conduct.

B. *Alleged Exclusionary Conduct*

Covad presents essentially ten categories of BellSouth's alleged exclusionary conduct in violation of Section 2 of the Sherman Act: (1) continually delaying and obstructing Covad's attempts at physical collocation despite its availability, Complaint ¶¶ 47-64;[11] (2) delaying of provisioning

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[11] The court notes that these listed allegations are merely categories of complaints which contain several specific practices of BellSouth which Covad states is exclusionary conduct. For example, for the first allegation, Covad alleges BellSouth delayed or obstructed collocation by: imposing delays in finding space, Complaint ¶¶ 47-49; creating a cumbersome request process, *id.* ¶ 50; slowing the speed of price quotes, *id.* ¶¶ 51-53; slowing the speed of collocation provisioning, *id.* ¶¶ 54-57; mandating virtual rather than physical collocation, *id.* ¶ 58; mandating caged rather than cageless collocation, *id.* ¶ 59; and creating obstacles to

of interoffice transport and customer circuits, *id.* ¶¶ 65-66; (3) delaying the processing of Covad customer orders by maintaining an operational support system that is slow and inefficient, *id.* ¶¶ 67-71; (4) engaging in exclusionary loop practices by impeding Covad from getting loops to its user's premises, *id.* ¶¶ 72-83; (5) engaging in exclusionary line sharing practices, *id.* ¶¶ 84-90; (6) engaging in a price squeeze by driving the price of wholesale inputs high from BellSouth's position as both Covad's supplier and a retail competitor of DSL services, *id.* at ¶¶ 91-95; (7) engaging in suppression of output by failing to offer DSL services until forced to do so through competition, *id.* ¶ 15; (8) strategically understaffing wholesale divisions to delay the processing of Covad customer orders, *id.* ¶ 96; (9) engaging in misleading advertising by promoting a nonexistent product, *id.* ¶¶ 97-98;[12] (10) misappropriation of confidential customer information, *id.* ¶¶ 99-101; and (11) engaging in a pattern of anti-

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installation and access, *id.* ¶¶ 60-64. For brevity, the court has consolidated many of these allegations.

[12] The allegations of misleading advertising include the following:

> . . . Bellsouth has engaged in activities designed to mask its own inability to deliver timely service, so as to prevent Covad from gaining any significant market share as a first-to-market competitor with BellSouth in the DSL market. One such activity is BellSouth's knowingly false, misleading and fraudulent marketing campaign for its DSL Fast Access product.
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> For example, BellSouth advertises on its website that it will use its best efforts to install DSL within 10 to 14 business days from the date of customers' order. *See* <https://fast1.corp.bellsouth.net/adsl/faq.jsp#installation3> ("How soon can I get DSL installed? We make every effort to ship self-install kits for receipt within 10-12 business days of order placement. For technician installations, we make every effort to schedule an installer within 10-14 business days of your order."). . . . BellSouth makes these promises despite its clear lack of resources devoted to provisioning DSL services. BellSouth's representation that it can process DSL orders within ten to fourteen business days is patently false, and seeks to occupy the market with a product that cannot be delivered.

Complaint ¶¶ 97-98.

competitive conduct generally designed to leverage Bell-South's monopoly power in local networks into enhanced market power in DSL markets, *id.* ¶ 45. These allegations will be organized according to their respective theories of exclusionary conduct.

1. *Refusal to Deal/Essential Facilities*

The first five allegations (listed above) of exclusionary conduct fall under the doctrine of essential facilities which is a type of refusal to deal. "A unilateral refusal to deal is [generally] not unlawful. Under certain circumstances, however, even a unilateral refusal to deal may constitute a violation of [Section] 2." *Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc.*, 919 F.2d 1517, 1522 (11th Cir. 1990). "The proscription on monopolization and attempts to monopolize may embrace a unilateral refusal to deal when accompanied by the intent to monopolize and the requisite degree of market power." *Id.* (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-78 (1973)). A monopolist's refusal to deal thus becomes actionable under the antitrust laws "only where the refusal is designed to have an anti-competitive effect, whether to gain greater market share, to drive up prices, or to obtain some other illegal goal." *Id.* at 1522 (citing *Mid-Texas Communications Sys., Inc. v. AT&T*, 615 F.2d 1372,1385-86 (5th Cir. 1980)).

A form of a refusal to deal in which someone is denied access to a particular facility has become known as the "essential facilities" doctrine. The essential facilities doctrine imposes liability on a Section 2 defendant when the plaintiff proves the following elements: (1) control of an essential facility by a monopolist; (2) a competitor's inability reasonably or practically to duplicate the essential facility; (3) denial of the use of the facility to the competitor; and (4) providing the competitor access to the facility is feasible. *See MCI Communications Corp. v. AT&T*, 708 F.2d 1081,1132-33 (7th Cir. 1983); *Valet Apartment*, 865 F. Supp. at 833.

In this case, as noted above, Covad's first five allegations concerning: (1) denial of physical collocation; (2) delaying interoffice transport and customer circuits; (3) engaging in

exclusionary loop practices; and (4) delaying the processing of customer orders by maintaining an operational support system that is slow and inefficient; and (5) engaging in exclusionary line sharing practices, all fall under the essential facilities doctrine. Further, BellSouth contends, and Covad admits, that these allegations arise from BellSouth's duties under the 1996 Act and Covad's interconnection agreement with BellSouth. BellSouth argues that because these allegations relate to its duties under the 1996 Act, antitrust claims arising from these allegations must be dismissed as in *Goldwasser*.

Covad responds to BellSouth's contentions by emphasizing the liberal standard of a Rule 12(b)(6) motion and the broad language of the elements for pleading Section 2 claims. Covad also disagrees with the *Goldwasser* court and contends that the antitrust savings clause in the 1996 Act and the 1996 Act's legislative history clearly indicate that Section 2 suits may be brought when an ILEC fails to perform its duties under the Act.[13] Covad also points to the brief filed by the

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[13] Covad further notes that several members of Congress and even the Attorney General of the United States believe that *Goldwasser* was wrongly decided and that aggrieved CLECs can bring antitrust suits against ILECs for failure to perform duties under the 1996 Act. For example, during a hearing on the Department of Justice before the House Judiciary Committee, the following dialogue ensued between House Member Chris Cannon and Attorney General John Ashcroft:

> CANNON: [O]ne of the issues that has been poignant has been the scope of the antitrust effort as to broadband. In March of this year, the Justice Department, together with the Federal Communications Commission, filed a joint amicus curiae brief in the 11th Circuit in the case of *Intermedia Communications v. BellSouth*. The amicus brief was a joint DOJ and FCC commentary on the court's holding in an earlier case in the 7th Circuit, which was *Goldwasser v. Ameritech*. The Justice Department's amicus brief argued that *Goldwasser* and its progeny are clearly in error. . . .
>
> For the benefit of the members of this committee, would you please summarize your department's position on the *Goldwasser* decision and the way that decision has been interpreted by the regional Bell operating companies in subsequent litigation?

FCC and the Department of Justice on behalf of a CLEC in the *Intermedia* case, which is currently on appeal to the Eleventh Circuit. Covad argues that because the FCC disagrees with the *Goldwasser* court, this court should interpret the 1996 Act as not precluding suits under the Sherman Act premised on duties under the 1996 Act.

After considering these arguments, the court agrees with the *Goldwasser* court. Allegations one through five clearly represent affirmative duties which are above and beyond the requirements of the Sherman Act. Almost every district court since the opinion in *Goldwasser* has dismissed antitrust claims which allege exclusionary conduct arising from the failure to perform duties under the 1996 Act, especially allegations styled under an essential facilities theory. Moreover, those courts that did not dismiss Section 2 claims provided little or no reasons why the motion to dismiss was denied. The court recognizes that the FCC, the Department of Justice, and certain members of Congress have favored a broader scope of Section 2 violations that should be available for failing to perform duties under the 1996 Act. These facts are instructive but not persuasive. If Congress and the FCC desire to amend the 1996 Act and accompanying regulations to specifically include antitrust remedies for failing to perform affirmative duties, then they may do so. In the meantime, this court's role is to apply the current, correct and logical

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ASHCROFT: Thank you very much. In asking the question, I think you've defined the position of the department relatively clearly. I would just reiterate the fact that in the enactment of the 1996 telecommunications reform measures, the Congress expressed its will and intent with very substantial clarity with a savings clause indicating that the antitrust prerogatives that inure to the enforcement authorities would remain in place.

When courts of appeals indicated that this was – or at least wrote an opinion which was interpreted to say this was no longer the case – we felt it very important that the department again reiterate what the Congress had explicitly, in our judgment, made clear in the 1996 act. And that remains the position of the Department of Justice.

Hearing on the Justice Department Before the House Comm. on the Judiciary, (June 2, 2001), 2001 WL 615726.

interpretation of the 1996 Act and the Sherman Act. Accordingly, the first five allegations of exclusionary conduct under the Sherman Act cannot stand, and fail to state a claim on which relief can be granted.

The court also finds that allegations six and eight fail to state a claim under Section 2 of the Sherman Act. Allegation eight, which alleges that BellSouth engaged in a pattern of intentionally "understaffing" wholesale divisions and delayed the processing of customer orders, is simply another complaint of a refusal to deal or a denial of essential facilities stemming from BellSouth's failure to live up to its 1996 Act duties. Hence, this allegation is "inextricably linked" with BellSouth's duties under the 1996 Act, as noted in *Goldwasser*. Allegation seven also fails to state a claim under Section 2, even disregarding the holding of *Goldwasser*. Simply because BellSouth chose not to provide DSL services until CLECs began to offer such services does not amount to exclusionary conduct which affected Covad. Indeed, Covad did not even exist until shortly after the 1996 Act was enacted. In sum, BellSouth's motion is GRANTED for claims under the Sherman Act which rely on allegations (1) - (5) and (7) - (8) and are hereby DISMISSED under Rule 12(b)(6).

2. *Predatory Price Squeeze*

Covad alleges that BellSouth engaged in an unlawful price squeeze by "impos[ing] upon Covad a two-pronged pricing structure that makes it uneconomical for Covad to compete with BellSouth." Complaint ¶ 91. Covad alleges the pricing structure sets a high wholesale price for DSL loops sold to CLECs while at the same time setting a low retail price for its retail DSL service, thus making Covad's DSL service unprofitable. *See id.* ¶ 92.

A price squeeze has been defined as "occurring when a vertically integrated company sets its prices or rates at the first (or "upstream") level so high that its customers cannot compete with it in the second-level (or "downstream") market." VON KALINOWSKI, SULLIVAN & MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION (2d ed. 1996) § 27.04; *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d

Cir. 1945) (Hand, J.). There are three prerequisites for an actionable price squeeze: (1) the defendant must operate at two levels of an industry, and its competitors at one level must also be its customers; (2) the defendant's rates or prices at the second level must be "too low" relative to the prices charged to competitors at the first level, so the customer/competitor is "squeezed" and cannot compete at the second level; and (3) to establish a Section 2 claim, the defendant must have monopoly power at the first level and must use the price squeeze to monopolize or attempt to monopolize the second level. *See City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1376-77 (9th Cir. 1992); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 18 (1st Cir. 1990) (Breyer, J.).

Courts have analyzed price squeezes differently when the defendant is an entity in a highly regulated industry. In *Town of Concord*, the First Circuit held that the existence of effective price regulation at both the first and second industry levels "makes it unlikely that requesting such rates will ordinarily create a serious lack of significant anticompetitive harm. . . . [T]herefore, [] price regulation will, in most cases, prevent a price squeeze from constituting an exclusionary practice of the sort that Sherman Act [section] 2 forbids." *Town of Concord*, 915 F.2d at 19. In contrast to *City of Concord*, the court in *City of Anaheim* (and other circuits) found that a regulated industry could be protected from Section 2 liability if the alleged price squeeze was not accompanied by a specific intent to monopolize. *See City of Anaheim*, 955 F.2d at 1378-79.

In this case, the court finds that Covad's price squeeze allegations fail for the same reasons that its essential facilities allegations fail. Covad is able to purchase wholesale DSL loops from BellSouth because the 1996 Act mandates that BellSouth provide them at a set, nondiscriminatory price. *Goldwasser* considered a similar allegation, which stated: "Ameritech has refused to sell to its competitors local telephone services at wholesale prices that are just, reasonable, and nondiscriminatory, which prevents the competitors in turn from offering attractive resale prices to consumers."

Goldwasser, 222 F.3d at 395. Although this is not an allegation of a true price squeeze in that there is no allegation that the ILEC set accompanying low retail prices for its own DSL services, the price squeeze allegation in this case clearly reflects duties under the 1996 Act, the Interconnection Agreement, and the prices set by PSCs.[14] Thus, the court finds that Covad's price squeeze allegations are intertwined with 1996 Act duties, and hereby DISMISSES allegation six for failure to state a claim.

3. *Predatory Advertising and Promotion*

Covad contends, as noted in allegations nine and ten, that BellSouth engaged in predatory advertising and promotion by making misleading statements about their "FastAccess" DSL service and by misappropriating Covad's customer lists.

The court is unaware of any Eleventh Circuit case dealing with false advertising or misappropriation of customer lists as exclusionary conduct, and as commentators have recognized: "Predation effected through promotion or advertising has been characterized as an area of law that is unclear at best." VON KALINOWSKI ON ANTITRUST § 27.04[3]. However, a few circuits have addressed this topic and found that certain types of advertising and promotional activities can constitute exclusionary conduct. *See, e.g., National Ass'n of Pharm.*

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[14] For example, Covad's allegations of an artificially high wholesale loops costs include:

> First, BellSouth did not offer line sharing to Covad at all until June 2000. As a result, for most of the relevant period, Covad has been entirely unable to obtain the costing benefits of line sharing. Covad was left, instead, to purchase the much more expensive and unnecessary stand-alone loops, or be unable to offer any competition at all. Second, since June 2000, line sharing has been available to Covad only on a very limited basis, and BellSouth has failed to develop processes to provision it in a timely and dependable manner. Thus, while BellSouth has installed approximately 140,000 line-shared DSL lines for its own retail customers, it has installed fewer than 400 line-shared lines for Covad, despite Covad's placement of thousands of orders. . . .

Complaint ¶ 95. As shown above, these activities are related to BellSouth's duties under the 1996 Act.

Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904 (2d Cir. 1988) (holding that the plaintiff should be allowed to go forward with discovery to substantiate claim that predatory advertisement was false, although the plaintiff must overcome a presumption that the effect on competition is *de minimis*);[15] *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100 (5th Cir. 1988) (noting that advertising which "creates barriers to entry in market constitutes predatory behavior of the type antitrust laws are designed to prevent"); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 927 (9th Cir. 1980) (finding that appropriation of slogans and symbols, among other activities, "could have made [the plaintiff's] entry into the market more difficult and costly, to the detriment of competition generally"); *International Travel Arrangers, Inc. v. Western Airlines. Inc.*, 623 F.2d 1255 (8th Cir. 1980) (holding that it is unlawful for a monopolist to use false advertising for purposes of preventing competition).

Here, the court finds that the allegations of misleading advertising could constitute unlawful exclusionary conduct. The court in *Goldwasser* did not consider false advertising as exclusionary conduct, and this court finds that these allegations could be considered "freestanding antitrust claims" outside the coverage of the 1996 Act. Although the effect of the advertising may have had a minimal effect on competition, the court cannot decide on a Rule 12(b)(6) motion if these allegations are meritless. Therefore, BellSouth's motion to dismiss is DENIED for allegations in category nine.

However, the allegations surrounding misappropriation of confidential customer information may not survive a motion

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[15] The court in *Ayerst Labs* noted Professors Areeda's and Turner's formula to determine if false advertising may overcome a *de minimis* presumption. The plaintiff must show " 'by cumulative proof that the representations were [1] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals.' " *Ayerst Labs*, 850 F.2d at 916 (quoting 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 738a, at 279).

to dismiss because they are included under the 1996 Act. Section 222(b) states: "A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purposes, and shall not use such information for its own marketing efforts." This duty is also covered by paragraph 9 of the Interconnection Agreement between BellSouth and Covad. Therefore, the misappropriation of customer information cannot be considered a freestanding claim and BellSouth's motion is GRANTED for allegations in category ten and are hereby DISMISSED.

4. *Monopoly Leverage*

Finally, Covad also contends that BellSouth engaged in monopoly leveraging by using its monopoly power in the local telephone service industry to gain advantage in the DSL market. Monopoly leveraging involves the use of monopoly power in one market to gain an advantage in another market. *See Eastman Kodak*, 504 U.S. at 483; *United States v. Griffith*, 334 U.S. 100 (1948). To establish illegal leveraging of monopoly power the challenged conduct must "threaten[] the [second] market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share." 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (1996) § 652c, at 90. When leveraging results in monopoly power or comes perilously close to achieving such power in the second market, there is no doubt that leveraging violates Section 2. *See Griffith*, 334 U.S. at 108. However, the circuits are split on whether a Section 2 violation can be made when leveraging provides only an advantage in the second market that falls short of the market power necessary to find attempted monopolization, or that monopoly leveraging even exists as a separate theory of exclusionary conduct. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979) (need not show attempted monopolization in second market); *see also M&M Med. Supplies and Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168-69

(4th Cir. 1992) (en banc) (declining to determine whether there exists a claim for monopoly leveraging that differs materially from the classic claim for monopolization); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 204-06 (3d Cir. 1992) (rejecting monopoly leveraging); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 n. 16 (9th Cir. 1991) (rejecting monopoly leveraging).[16] The Eleventh Circuit has indicated that it would follow *Berkey Photo*, although the court has harbored "some reservation about the conclusion that no attempt to monopolize the leveraged market need be proved." *See Key Enters. of Del., Inc. v. Venice Hosp.*, 919 F.2d 1550, 1567 (11th Cir. 1990), *vacated as moot*, 9 F.3d 893 (11th Cir. 1993); *see also Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 145 F.3d 1258, 1262 (11th Cir. 1998) (declining to "extend *Berkey Photo* to a situation in which a monopolist projects its power into a market it not only does not seek to monopolize, but in which it does not even seek to compete.").

In this case, the court finds that Covad may state a claim for monopoly leveraging through exclusionary conduct not implicated by the 1996 Act. Covad has not stated in its allegation of monopoly leveraging that BellSouth has monopolized or attempted to monopolize the DSL market and only noted that BellSouth would receive "enhanced market power" in the DSL market. However, the Eleventh Circuit (although expressing reservations) has not expressly rejected monopoly leveraging as an independent theory or the lack of requiring a showing of attempted monopolization. The monopoly leveraging claim also does not suffer from the same defect as the essential facilities and price squeeze claims which alleged exclusionary conduct based solely on BellSouth's duties under the 1996 Act. BellSouth's alleged monopoly power in the local telephone market could be used to leverage monopoly power in the DSL market even in the

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[16] The district court in *Stein* (discussed above) dismissed monopoly leveraging claims because the Ninth Circuit does not recognize monopoly leveraging as an independent theory of liability under Section 2.

absence of the 1996 Act.[17] Further, *Goldwasser* did not involve a secondary market such as DSL services, and the court did not consider any allegation of monopoly leveraging. Although Covad's leveraging theory is no doubt based largely on BellSouth's failure to permit collocation to competitors, the allegation of leveraging also includes references to other anticompetitive conduct which would include misleading advertising and other activities not implicated by the 1996 Act. Accordingly, the motion to dismiss the monopoly leverage allegation is DENIED.

To summarize the court's ruling on the motion to dismiss claims under Section 2 of the Sherman Act, the motion to dismiss is GRANTED as follows: (1) Count 1 for essential facilities and is hereby DISMISSED without leave to amend, along with allegation categories one through five and seven and eight (Complaint ¶¶ 15, 47-90 and 96); (2) allegations of a price squeeze in category six (*Id.* ¶¶ 91-95) and are hereby DISMISSED without leave to amend; (3) allegations of misappropriation of confidential customer information in category ten (*Id.* ¶¶ 99-101) and are hereby DISMISSED without leave to amend. The motion is DENIED for: (1) Counts 2 and 3 of the complaint as they relate to allegations of predatory advertising in category nine (*Id.* ¶¶ 97-98); and (2) Count 2 of the complaint as it relates to allegations of monopoly leveraging in category eleven (*Id.* ¶ 45).

III. *Claims under State Antitrust Law*

BellSouth has also moved to dismiss all the state antitrust claims in the complaint under Rule 12(b)(6) for the same

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[17] For example, assuming that the 1996 Act and the Interconnection Agreement did not exist and Covad was required to build its own independent network, a monopoly leveraging theory could work because BellSouth could use its monopoly power in the local telephone market (by possessing almost all local loops) to achieve monopoly power in the DSL market. Although the facts supporting Covad's leveraging claim may ultimately turn on questions of Covad's access to BellSouth's network, for the purposes of a Rule 12(b)(6) motion, the court finds that a monopoly leveraging theory is at least cognizable at this stage of the litigation.

reasons stated in its motion to dismiss claims under the Sherman Act. Covad has brought antitrust claims for monopolization and attempted monopolization under the laws of six states: ALA. CODE § 8-10-3; FLA. STAT. § 542.19; KY. REV. STAT. ANN. § 367.175; LA. REV. STAT. ANN. § 51.123; N.C. GEN. STAT. § 75-21; TENN. CODE ANN. § 47-25-101. Many of the antitrust laws of these states closely mirror federal law and/or expressly defer to federal case law interpreting antitrust law. *See, e.g.*, FLA. STAT. ANN. § 542.32 ("[D]ue consideration and great weight [is to] be given to the interpretations of the federal courts relating to comparable federal antitrust statutes."); N.C. GEN. STAT. § 75-2.1 (containing language identical to Section 2); *McCluney v. Zap Prof'l Photography, Inc.*, 663 So. 2d 922, 926 (Ala. 1995) ("The federal law relating to monopolization governs Alabama antitrust actions."); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 478 So. 2d 1240 (La. Ct. App. 4 Cir. 1985) ("To establish a cause of action under [LA. REV. STAT. ANN. § 51.123], the pleadings must state facts sufficient to show that the Defendants possessed monopoly power in a clearly defined economic and geographic market and had the general purpose or intent to exercise or maintain that power.").

However, the laws of Kentucky and Tennessee expressly prohibit the application of their antitrust laws to utilities such as BellSouth. *See* KY. REV. STAT. ANN. § 367.176(1) ("No provision of KRS 367.175 shall be construed to make illegal the activities of . . . any utility [such as BellSouth] as defined in KRS 278.010(3)."); *State ex rel. Thompson v. Nashville Ry. & Light Co.*, 151 Tenn. 77, 268 S.W. 120, 124 (1925) ("Telephone and telegraph companies . . . and all like concerns do not fall within the purview of the Anti-Trust Act, chapter 140, Acts of 1903 [now section 47-25-101], relating to the production and distribution of articles made from domestic raw material.").

Because Kentucky and Tennessee prohibit the application of their antitrust laws to utilities such as Bellsouth, these counts are hereby dismissed. The remaining state law antitrust counts will be dismissed concerning all the allegations

that were dismissed under the Sherman Act, but the remaining state law claims can continue under theories of predatory advertising and monopoly leveraging. Accordingly, BellSouth's motion to dismiss Counts 13, 14, 22 and 23 is GRANTED and these counts are DISMISSED without leave to amend. The motion is DENIED for Counts 6, 7, 9, 10, 16, 17, 19, and 20 relating to allegations of misleading advertising.

IV. *Claims under the 1996 Act and for Breach of Contract*

BellSouth has also moved to dismiss Count 4: claims under 47 U.S.C. §§ 206, 207 and 222 of the 1996, and Count 5: breach of contract, pursuant to Rule 12(b)(1). BellSouth contends that these counts should be dismissed for lack of jurisdiction because the dispute has not been submitted to the respective state PSCs. Covad responds that the dispute alleged in the complaint goes far beyond disputes reviewed by state PSCs and that PSCs are not the proper forum in this case because they are unable to award damages for past conduct.

PSCs have the power to not only consent to Interconnection Agreements, but to later interpret and enforce them as well. *See Supra*, No. 99-1706-CIV, p. 8; *see also Southwestern Bell. Tel. Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Comm. Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *BellSouth Telecomm., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 97 F. Supp. 2d 1363, 1366 (N.D. Ga. 2000). Federal courts only possess jurisdiction under 47 U.S.C. § 252(e) following a determination by a PSC. *See Supra*, No. 99-1706-CIV, p. 8; *Indiana Bell Tel. Co. v. McCarty*, 30 F. Supp. 2d 1100 (S.D. Ind. 1998). Courts have found that section 252(e) governs disputes arising from interconnection agreements. *See Southwestern Bell Tel. Co. v. McKee*, 1997 WL 450041 at *2 (D. Kan. July 15, 1997) (finding that Congress, through 252(e), expressed its intent that courts would "construe strictly the jurisdictional provision of the [1996 Act] and resolve any doubts against federal jurisdiction"); *see also Indiana Bell*, 30 F. Supp. 2d at 1104

(noting that allowing complainants to circumvent the jurisdictional scheme would "jeopardize the entire system of review established by the Act"). Courts have also found that sections 206 and 207 do not grant federal courts jurisdiction independent of section 252(e) when claims directly implicate the regulatory scheme of the 1996 Act. *See Intermedia*, No. 8:00-Civ-1410-T-24; *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 123 F. Supp. 2d 738, 743 (S.D.N.Y. 2000).

Covad alleges in Count 4 that BellSouth violated section 222 for misappropriating customer information, and alleges in Count 5 that it breached its interconnection agreement. Both of these counts relate directly to duties under the 1996 Act or the interconnection agreement, which are to be first reviewed and enforced by the respective PSCs. Because Covad's complaint does not indicate that it sought review of a determination by a PSC, this court does not have jurisdiction under section 252(e). Accordingly, the motion to dismiss Counts 4 and 5 of the complaint is GRANTED and these counts are DISMISSED without leave to amend.

V. *State Law Claims for Interference with Business Relations and Unfair Competition*

Finally, BellSouth moves to dismiss all of Covad's counts of interference with business relations under Rule 12(b)(3) and (6). BellSouth contends that these claims must fail because: (1) facts alleged to show interference are preempted by the 1996 Act; (2) interference claims from states other than Georgia are inapplicable because of a choice-of-law clause in the interconnection agreement; and (3) all the interference claims fail to state a claim because BellSouth is not a "stranger" to the relationship of Covad and its DSL customers.

Covad has brought counts for tortious interference with business relations under the laws of Alabama, Florida, Georgia, Kentucky, North Carolina, and Tennessee, and one court of unfair competition under Louisiana law.[18] For each count,

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[18] To prove tortious interference with business relations, the plaintiff must demonstrate (1) the existence of a contract or business relation;

Covad alleges that BellSouth unlawfully interfered with its contractual and business relations with its customers. The interference occurred when:

> . . . [BellSouth] attempted to and did exclude Covad from competing in [each state], in the process interfering with Covad's ability to offer services to consumers in those markets, including causing the cancellation of contracts to purchase Covad service. BellSouth further improperly interfered with Covad's existing and prospective business relations with customers by, among other things, improperly soliciting customers not to enter into contracts with Covad or to breach existing contracts, disparaging Covad's products and services, and wrongfully delaying and refusing to supply services necessary for development and completion of Covad's business relations with its existing and prospective customers.

Complaint ¶¶ 139, 158, 167, 186, 218 and 237.

Similar to Covad's allegations surrounding its antitrust claims and breach of contract claims, the court finds that allegations relating to BellSouth's duties under the 1996 Act fail to state a claim. These allegations would include all the allegations (noted above) for categories (1)-(8) and (10) (paragraphs 47-96 and 99-101 of the complaint) and which relate to the claims for business interference (noted in the above paragraph) in allegations such as "interfering with Covad's ability to offer services to consumers" and

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(2) the defendant's knowledge of the contract or business relation; (3) intentional interference by the defendant with the contract or business relation; (4) the absence of justification for the defendant's interference; and (5) damage to the plaintiff resulting from the interference. *See Soap Co. v. Ecolab, Inc.*, 646 So. 2d 1366, 1370-71 (Ala. 1994); *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994) (same); *Choice Hotels Intl. v. Ocmulgee Fields, Inc.*, 222 Ga. App. 185, 188, 474 S.E.2d 56 (1996) (same); *Carmichael-Lynch-Nolan Adver. Agency, Inc. v. Bennett & Assocs., Inc.*, 561 S.W.2d 99, 102 (Ky. Ct. App. 1977) (same); *Market Am., Inc. v. Christman-Orth*, 135 N.C. App. 143, 158, 520 S.E.2d 570 (1999) (similar elements); *New Life Corp. of Am. v. Thomas Nelson, Inc.*, 932 S.W.2d 921, 927 (Tenn. Ct. App. 1996) (same).

"wrongfully delaying and refusing to supply services necessary for development and completion of Covad's business relations." These allegations are merely a restated breach of contract claim, which the court has already dismissed for the reasons noted above.

However, Covad's claims for interference with business relations could still survive under allegations of "improperly soliciting customers not to enter into contracts with Covad or to breach existing contracts, [and] disparaging Covad's products and services." These allegations, standing apart from the 1996 Act, could state a claim for interference with business relations. Although an "improper solicitation" may include BellSouth's alleged misappropriation of confidential customer information (which the court has dismissed), an improper solicitation and "disparagement" of Covad could constitute an interference with business relations without the alleged misappropriation.

The court rejects BellSouth's arguments that BellSouth is not a "stranger" to the relationship of Covad and its customers for a proper interference claim to be alleged. The remaining allegations of improper solicitation to not enter into contracts with Covad and disparagement of Covad's services does not involve any duty under the 1996 Act or the Interconnection Agreement. The cases cited by BellSouth are also distinguishable. *See, e.g., Atlanta Market Ctr. Mgmt. Co. v. Equitable Real Estate Inv. Mgmt., Inc.*, 269 Ga. 604, 609, 503 S.E.2d 278 (1998) ("In order for a defendant to be liable for tortious interference with contractual relations, the defendant must be a stranger to both the contract and the business relationship giving rise to and underpinning the contract."). Although BellSouth may have provided wholesale services to Covad and BellSouth owns many of the lines used by Covad customers, BellSouth, under the facts alleged, would be a stranger to the business relationship of Covad and its customers for DSL services.

The court also rejects BellSouth's argument that the Interconnection Agreement's choice-of-law clause bars claims for interference with business relations under state laws other

than Georgia. The clause states that "[t]his Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Georgia, without regard to its conflict of laws principles." Agreement ¶ 17. However, the clause does not state that "any and all claims arising out of the relationship between the parties shall be governed by Georgia law." "Consequently, [the court] conclude[s] that the provision is not applicable in determining whether plaintiffs have set forth a valid tort claim." *Young v. W.S. Badcock Corp.*, 222 Ga. App. 218, 219, 474 S.E.2d 87 (1996); *see also Sunbelt Veterinary Supply, Inc. v. International Bus. Sys. U.S., Inc.*, 985 F. Supp. 1352, 1356 (M.D. Ala. 1997) (interpreting similar clause). Accordingly, BellSouth's motion to dismiss Counts 8, 11, 15, 18, 21 and 24 under Rule 12(b)(3) is DENIED.

Finally, the court agrees with BellSouth that Covad's claim under Louisiana's unfair competition statute (LA. REV. STAT. ANN. § 51:1405) is not applicable to BellSouth. LA. REV. STAT. ANN. § 51:1406 provides an exemption for unfair trade practices of utilities regulated by the Louisiana PSC, including actions arising from advertising.[19] Thus, the motion to dismiss Count 18 is GRANTED and the count is DISMISSED.

Summary

The defendants' motion to file excess page limitations [Doc. No. 5-1] is hereby GRANTED. The defendants' motion to dismiss [Doc. No. 6-1] is GRANTED in part and

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[19] The opinion of the Louisiana Attorney General states in part:

> Since advertising by electric utilities is undeniably a matter both connected with and growing out of service rendered by such public utilities, and such advertising expends funds generated by consumer billings and adds to expenses taken into account in the rate determination process, advertising by electric utilities is an action or transaction subject to jurisdiction of the public service commission and is thus encompassed by exemption from consumer protection law under this section.

Op. Atty. Gen., No. 77-185, March 16, 1977.

DENIED in part. The motion is GRANTED for the following counts and allegations:

(1) Count 1 for essential facilities, along with allegation categories one through five and seven and eight (Complaint ¶¶ 15, 47-90 and 96);

(2) allegations of a price squeeze in category six (*Id.* ¶¶ 91-95);

(3) allegations of misappropriation of confidential customer information in category ten (*Id.* ¶¶ 99-101);

(4) Counts 4 and 5 for breach of contract and under the 1996 Act;

(5) Counts 13, 14, 22 and 23 under state antitrust law;

(6) Count 18 under Louisiana law.

The motion is DENIED for:

(1) Counts 2 and 3 of the complaint as they relate to allegations of predatory advertising in category nine (*Id.* ¶¶ 97-98); and

(2) Count 2 of the complaint as it relates to allegations of monopoly leveraging in category eleven (*Id.* ¶ 45).

(3) Counts 6, 7, 9, 10, 16, 17, 19, and 20 under state antitrust law;

(4) Counts 8, 11, 15, 18, 21 and 24 under state law for interference with business relations.

SO ORDERED, this 6th day of July, 2001.

/s/ BEVERLY B. MARTIN
Beverly B. Martin
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-16064

COVAD COMMUNICATIONS COMPANY,
DIECA COMMUNICATIONS, INC. D/B/A
COVAD COMMUNICATIONS COMPANY,
Plaintiffs-Appellants,

v.

BELLSOUTH CORPORATION,
BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

[December 20, 2002]

ON PETITION FOR REHEARING

Before EDMONDSON, Chief Judge, and TJOFLAT, ANDERSON, BIRCH, BLACK, CARNES, BARKETT, MARCUS and WILSON, Circuit Judges.*

BY THE COURT:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is DENIED.

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* Judge Dubina and Judge Hull having recused themselves did not participate.

TJOFLAT, Circuit Judge, dissenting from the denial of Rehearing En Banc, in which ANDERSON and BIRCH, Circuit Judges, join:

I. Background

A. Telephone Regulation

Not long after Alexander Graham Bell invented the telephone, government regulators sought to deal with the public policy issues inherent in a service that was both considered to be a natural monopoly (due to the economies of scale and network effects of local telephony) and essential for the day-to-day functioning of the American public. Prior to 1996, government regulators operated under the assumption that local exchange carriers (LECs) should not only be rate-regulated, but also quarantined to the business of local telephony. The latter premise was embodied by the consent decree that broke up AT&T. In the government's 1974 antitrust suit against AT&T, the government argued that AT&T (1) discriminated against rivals who needed access to the local loop (such as long distance companies or providers of information services) and (2) engaged in predatory pricing against rivals – a scheme of cross-subsidization that was made more likely by the fact that AT&T simultaneously operated in both regulated/monopolistic and unregulated/competitive markets. *See* Roger Noll & Bruce Owen, *The Anticompetitive Uses of Regulation: United States v. AT&T, in The Antitrust Revolution* 290, 295-96 (J. Kwoka & L. White, eds., 1989). District Judge Harold Greene approved a consent decree between the government and AT&T in the form of the Modified Final Judgment (MFJ) entered in 1982. *See United States v. Am. Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *aff'd*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472.[1] Judge Greene retained jurisdiction over the case, and the Department of

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[1] The MFJ split AT&T's local service into seven Regional Holding Companies (RHCs): U.S. West, Pacific Telesis, Southwestern Bell, Ameritech, Nynex, Bell Atlantic, and BellSouth. The MFJ also employed various line-of-business restrictions which, for example, precluded the RHCs from providing long distance service or information services.

Justice promised to report to court every three years regarding the continuing need for the "line of business" restrictions. With the case on his docket for eighteen years, Judge Greene in effect became the telecommunications czar of the nation.

1996 marked a paradigm change in telephone regulation; competition, not quarantine, would best advance the public interest. In that year, Congress passed monumental legislation, the Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*). The legislation aimed to spark competition in the provision of local telephony. Congress also hoped to foster additional competition in telecommunications markets which had, due the MFJ's line-of-business restrictions, been insulated from competition by very important competitors – namely, the RHCs. *See* Glen Robinson, *The Titanic Remembered: AT&T and the Changing World of Telecommunications*, 5 Yale J. on Reg. 517, 534-44 (1988). The 1996 Act has three components which are especially noteworthy. First, the Act made an important change in who regulates the telecommunications industry. The Act abolished the MFJ, *see* Pub.L. 104-104, Title VI, § 601, 110 Stat. 142 (codified at 47 U.S.C. § 152 note),[2] and it delegated to the FCC authority to implement regulations that advance the pro-competition objectives of the Act, *see, e.g.*, 47 U.S.C. § 251(d)(1).[3] Judge Greene was, in short, replaced by the FCC.[4] Second, the Act substantively

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[2] The provision states:

> Any conduct or activity that was, before the date of enactment of this Act [Feb. 8, 1996], subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act . . . and shall not be subject to the restrictions and obligations imposed by such Consent Decree.

[3] The statute provides that "[w]ithin 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section."

[4] As the Seventh Circuit explained:

> Long before the 1996 Act was passed . . . it had become clear that comprehensive regulation of the rapidly advancing telecommunica-

changed the way the telecommunications industry is regulated by imposing various obligations on incumbent local exchange carriers (ILECs). These obligations are defined by section 251,[5] whereas section 252 governs the implementation of the obligations. Specifically, section 252(a) provides that ILECs and competitive local exchange carriers (CLECs) can voluntarily enter into interconnection agreements, and section 252(b) provides that state public service commissions (PSCs) can fashion an agreement through arbitration in the event that negotiations stall. The Act thus contemplates top-down regulation by the FCC, voluntary or arbitrated agreements,[6] and resolution of post-agreement disputes in the form of contract adjudication. Section 252 also covers additional matters, such as the grounds PSCs must give in order to reject an agreement,[7] what happens if a PSC chooses not to

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tions markets was not a task well suited to the federal courts. Thus, one of the first things Congress did in the 1996 Act was to shift the remaining authority the district court was exercising under the MFJ over to the FCC.

Goldwasser v. Ameritech Corp., 222 F.3d 390, 393 (7th Cir.2000).

[5] These include: the duty to negotiate interconnection agreements in good faith; the obligation to interconnect with competitors; the obligation to provide competitors with unbundled access to its network elements ("UNEs") at reasonable rates; the duty to offer for resell at wholesale rates any telecommunications service that the ILEC provides at retail; and the duty to allow collocation of the CLECs' equipment on the ILEC's premises. *See* 47 U.S.C. § 251(c). The 1996 Act thus envisions "three entry options: entry through resale, entry through pure facilities-based competition, and entry via the purchase of unbundled network elements." Stuart Benjamin, Douglas Lichtman, & Howard Shelanski, *Telecommunications Law and Policy* 718 (2001).

[6] There are thousands of existing agreements throughout the United States, and over 400 in BellSouth's territory.

[7] Section 252(e)(2) allows state commissions to reject an interconnection agreement only if the agreement discriminates against a third-party CLEC or is inconsistent with "the public interest, convenience, and necessity."

make an approve-or-reject determination at all,[8] and how PSC or FCC decisions can be appealed to a federal court.[9] The final component of the Act is the removal of the line-of-business restrictions. Some restrictions, for example, sunset automatically. *See, e.g.*, 47 U.S.C. § 275 (precluding RBOC[10] entry into the alarm monitoring business until 2001). Others are removed only after ILECs prove that they have fulfilled their obligations under the 1996 Act. *See, e.g.*, 47 U.S.C. § 271(c)(2)(B) (establishing a fourteen-point "competitive checklist" that RBOCs must meet before they may offer in-region long distance service).

B. This Dispute

Covad is the CLEC in this case; BellSouth is the ILEC. Covad is in the business of providing DSL service[11] – primarily through the use of BellSouth's physical plant. BellSouth and Covad entered into an interconnection agreement – ultimately approved by the Georgia PSC–pursuant to 47 U.S.C. § 252. Covad claims that BellSouth has not fulfilled its obligations under the 1996 Act and the BellSouth/Covad

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[8] Section 252(e)(5) instructs the FCC to act in the event of a PSC default.

[9] Section 252(e)(6), governing federal review of PSCs, provides that "any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 of this title and this section." There is no special review statute for the FCC, which is therefore reviewed by the courts of appeals pursuant to 28 U.S.C. § 2344.

[10] "RBOC" is an acronym for "Regional Bell Operating Company." RBOCs were the subdivisions of AT&T that provided local service throughout the nation prior to the MFJ. Under the MFJ, each RHC consisted of several RBOCs.

[11] "DSL" stands for "digital subscriber line." DSL is "a high-speed data service provided over conventional telephone networks. DSL refers to the technology that allows telephone carriers to attach certain electronics to the telephone line that can transform the copper loop that already provides voice service into a conduit for high-speed data traffic." *See* Stuart Benjamin, Douglas Lichtman, & Howard Shelanksi, *Telecommunications Law and Policy* 1048 (2001).

interconnection agreement. Specifically, Covad argues the following: BellSouth should have provided UNEs more promptly; BellSouth did not sufficiently provide space so that Covad could "collocate" its equipment on BellSouth's premises; BellSouth engaged in a "price squeeze" by pricing its UNEs too high while selling its DSL services to consumers at retail prices that are too low;[12] and BellSouth understaffed its wholesale division. The basic theory, then, is that Covad needs BellSouth's local loop to compete, and BellSouth has done a poor job of turning it over. Covad wants access, and it wants access more promptly and on less costly terms than BellSouth presently provides.[13]

The district court granted a dismissal, pursuant to Fed.R. Civ.P. 12(b)(6), based upon the reasoning of the Seventh

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[12] A "price squeeze" claim is premised upon an illegal wholesale/retail differential. For example, Covad states in its complaint that BellSouth's retail prices "are set so low related to its unbundled wholesale loop prices that Covad cannot meet BellSouth's wholesale or retail prices and still make a reasonable return on investment."

[13] Covad's complaint contains twenty-three causes of action. Count one seeks relief under section 2 of the Sherman Act pursuant to the "essential facilities doctrine." Count two seeks the same relief under section 2 of the Sherman Act based upon BellSouth's alleged "monopolization." Count three seeks the same relief under section 2 of the Sherman Act based upon BellSouth's alleged "attempted monopolization." All of the section 2 allegations are thus folded into count 3. Counts six, seven, nine, ten, thirteen, fourteen, sixteen, seventeen, nineteen, twenty, twenty-two, and twenty-three replicate counts two and three under the laws of the following states: Alabama, Florida, Kentucky, Louisiana, North Carolina, and Tennessee. Counts eight, eleven, twelve, fifteen, eighteen, and twenty-one allege that BellSouth interfered with business relations in violation of the laws of the same six states. Count four is a claim for breach of contract. Finally, count five asserts a cause of action directly under the Telecommunications Act of 1996. In the "prayer for relief" at the end of its complaint, Covad asks for treble damages on its antitrust claims, punitive damages on its state law tort claims, compensatory damages on the remaining claims, and "such other and further relief as the Court deems just and proper." One must assume that the latter relief would include injunctive orders necessary to ensure BellSouth's compliance with the antitrust laws, the 1996 Act, and the parties' interconnection agreement.

Circuit in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir.2000). A three-judge panel of this Court reversed, concluding that the obligations of ILECs under the 1996 Act and the Sherman Act are essentially coterminous, and therefore Covad's complaint alleges harms that, if proved, are cognizable under the antitrust laws. *See Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir.2002). Specifically, the panel found that BellSouth's alleged failure to promptly turn over its network would, if proved, give rise to liability under the essential facilities doctrine and the refusal-to-deal doctrine. The panel also held that BellSouth's allegedly high wholesale prices for its DSL UNEs, in conjunction with low retail prices on DSL service, states a "price squeeze" claim under Section 2 of the Sherman Act. This court declined to reconsider the panel's decision en banc. I dissent because the panel's holding has troubling implications for telecommunications law and, indeed, antitrust law as a whole. The panel decision took a turn that is bad policy, undermines Congress's regulatory scheme, and usurps regulatory power that belongs to the FCC under the 1996 Act by placing it in the hands of federal courts.

C. Overview

In part II of this opinion, I explain why the duty Covad seeks to impose – namely, the duty to help one's competitor – is required by the 1996 Act but not the antitrust laws. This proposition is supported by traditional antitrust doctrine and the fact that antitrust suits premised upon forced-access obligations would flout the intent of Congress. On the latter point, I explain how an overlap between the antitrust laws and the 1996 Act would make the 1996 Act's scheme of post-agreement dispute resolution a nullity and would put federal judges back into the regulatory mix, micromanaging telecommunications firms far beyond what Judge Greene could have imagined. Part III examines the panel's holding regarding Covad's "price squeeze" claim, concluding that Covad's allegations fail to state a claim under the antitrust laws. This part also explains how the panel's "price squeeze" holding will harm consumers and impede the rollout of broadband

Internet access, resulting in considerable tension with FCC policy. Part IV concludes.

II. The Duty of a Monopolist to Help its Competitors is an Extraordinary Obligation Imposed by the Telecommunications Act of 1996, but not the Antitrust Laws

The panel apparently believes that the 1996 Act's unbundling and interconnection obligations are coterminous with the duties of a monopolist under the antitrust laws. I disagree. Rather, as the Seventh Circuit held in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir.2000), the 1996 Act imposes additional obligations above and beyond what is required under the antitrust laws.[14] I reach this conclusion for two reasons: (1) antitrust doctrine has not (at least until now) ever required the sort of forced-access requirements

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[14] The Seventh Circuit clearly articulated what the world would have looked like if, counterfactually, Congress had opted to choose a "simple antitrust solution" rather than the extraordinary obligations placed upon ILECs:

> It would have been possible for Congress to have passed a statute that simply lifted the regulatory prohibitions found in sources such as the Telecommunications Act of 1934, the MFJ, and other sources, that barred companies in different parts of the telecommunications market (i.e. long distance and local markets, generally speaking) from entering one another's domains. Anyone who wanted to compete with an ILEC would have had the burden of duplicating its physical infrastructure or of persuading the ILEC to contract with it on mutually satisfactory terms, but this is the normal way in which competitive markets work. . . .
>
> In other words, Congress could have chosen a simple antitrust solution to the problem of restricted competition in local telephone markets. It did not. Instead, in an effort to jump-start the development of competitive local markets, it imposed a host of special duties on the ILECs; it entrusted supervision of those duties to the FCC and the state public utility commissions; and it created a system of negotiated agreements through which this would be accomplished. These are precisely the kinds of affirmative duties to help one's competitors that we have already noted do not exist under the unadorned antitrust laws.

Goldwasser, 222 F.3d at 399-400 (citations omitted).

sought by the plaintiff and (2) suits premised upon a forced-access regime under the antitrust laws would flout the intent of Congress.

A. Traditional Antitrust Doctrine Regarding Forced Access

1. The Essential Facilities Doctrine

Antitrust doctrine has never required the extensive, court-administered forced-access regime that the panel opinion contemplates in its holding regarding the so-called "essential facilities" doctrine.[15] Antitrust law generally poses no obligation upon firms to deal with competitors or share their capital investments with rivals. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-01, 105 S.Ct. 2847, 2856, 86 L.Ed.2d 467 (1985) ("[E]ven a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor . . . . The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates."); *see generally* 3A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 771b (1996) ("Forcing a firm to share its monopoly is inconsistent with antitrust's basic goals . . . ."). This is so for several reasons. The first reason is the fear that new entrants will not build their own physical plant if they can simply piggyback on the facilities of an incumbent; there is hardly meaningful competition without facilities-based competition. A second problem with a broad expansion of the essential facilities doctrine is that it would place trial courts in the role of quasi-regulatory agencies because they would have to oversee sharing between rivals. Third, the doctrine creates a disincentive to develop new

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[15] The panel, citing *MCI Communications v. Am. Tel. & Tel.*, 708 F.2d 1081, 1132-33 (7th Cir.1983), held that there are four elements to a claim under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *Covad*, 299 F.3d at 1286. The panel never mentioned the horizontal/vertical distinction that I discuss, *infra*.

technologies. If a competitor can simply utilize a court order to get access to an incumbent's physical plant, there is less incentive to create new technologies (such as wireless telephony) to bypass the perceived "essential facility." Finally, the doctrine creates little incentive for incumbents to roll out additional plant or upgrade existing facilities. Why bear all of the risk, only to have competitors reap the benefits? In sum, there are convincing reasons why the leading antitrust scholars condemn the essential facilities doctrine, and why they are steadfast in their argument that the Supreme Court has never explicitly endorsed the doctrine. *See id.* at ¶¶ 771b-c ("The Supreme Court has never articulated or approved the modern version of the essential facilities doctrine.").

The panel relied on two cases to support its expansive view of the essential facilities doctrine. The first is *Consolidated Gas Co. of Fla., Inc. v. City Gas Co. of Fla.*, 880 F.2d 297, 301 (11th Cir.1989), *on reh'g en banc*, 912 F.2d 1262 (11th Cir.1990), *vacated and remanded*, 499 U.S. 915, 111 S.Ct. 1300, 113 L.Ed.2d 235 (1991), *on remand*, 931 F.2d 710 (11th Cir.1991). That case was wrong because it failed to grasp a fundamental point: to the extent that the essential facilities doctrine is viable at all, it is a doctrine concerned with vertical foreclosure. The leading antitrust scholars confirm this view: "It should be clear from the outset that the essential facility doctrine concerns vertical integration – in particular, the duty of a vertically integrated monopolist to share some input in a vertically related market, which we call market # 1, with someone operating in an upstream or downstream market, which we call market # 2." *See* 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 771a; *see also Consolidated Gas*, 912 F.2d at 1291-92 (Tjoflat, C.J., dissenting) (arguing that the defendant's refusal to deal was justified on the basis that it was not a wholesaler, but rather a retailer similar to the plaintiff/competitor). Indeed, Covad concedes that my dissenting opinion was correct. *See* Covad Br. at 27 n. 14. In this case, BellSouth was in the business of providing DSL services via its local loop. Covad is similarly in the business of DSL provision (via BellSouth's local loop). The two

entities are thus horizontal competitors. Moreover, Covad does not want merely to interconnect its own facilities with BellSouth's network; it wants the facilities of BellSouth so that it can sell DSL services. The 1996 Act imposes this novel obligation; the antitrust laws do not. A reading of the essential facilities doctrine that stands for the proposed proposition – namely, that horizontal competitors that find it financially inconvenient to build their own physical plant may simply tap the resources of the incumbent/monopolist or else sue for treble damages – is a dangerous expansion of the antitrust laws indeed.[16]

The Seventh Circuit decision in *MCI Communications v. AT&T Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir.1983), makes this point clear (although the *Covad* panel somehow uses that case to support its position). In that case, the court held that there was no liability for AT&T's failure to provide access to its long-distance network. It was only in the vertical context that the essential facilities doctrine was implicated: MCI was entitled to interconnect its *long distance* network with AT&T's *local* exchanges. The court held that because MCI was seeking to compete with AT&T in the long-distance market, it was not entitled to rely on AT&T's existing long-distance facilities to enhance its ability to compete. As the Seventh Circuit later stated: "AT&T's

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[16] We rejected a similar claim in another case:

> This argument reveals the heart of the plaintiffs' claim: they want the right to benefit from [the defendant's] economies of scale. The plaintiffs are seeking a "free ride" – since they do not have a large enough operation to produce significant economies of scale and are unable, or unwilling, to finance the growth necessary to achieve these economies, they want to use, to their benefit, [the defendant's] size and the capital outlays used to achieve it . . . .
>
> The plaintiffs then are asking us to equip them with [the defendant's] competitive advantage. This is not a function of the antitrust laws. The antitrust laws are not intended to support artificially firms that cannot effectively compete on their own.

Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1572-73 (11th Cir.1991).

refusal to voluntarily assume 'the extraordinary obligation to fill in the gaps in its competitor's network,' did not suffice to support a finding that it was trying to maintain its monopoly of long-distance telephone service by anticompetitive means." *State of Ill., ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1484 (7th Cir.1991) (quoting *MCI*, 708 F.2d at 1149). The *MCI* court held that "as pure matter of antitrust law . . . we decline to hold AT&T liable for a refusal to make available its full nationwide network to a competitor." *MCI*, 708 F.2d at 1149. The analogy between MCI and AT&T's long-distance division is similar to the analogy between BellSouth and Covad: each is a horizontal competitor of the other. Accordingly, the same result should obtain: the essential facilities doctrine should not be used to give the horizontal competitor access.

The essential facilities doctrine should not be applied in *Covad* for another reason. Covad seeks to force BellSouth to make extensive modifications to its network to accommodate Covad. *See* Plaintiff's Complaint, R1-1, ¶¶ 66, 70, 88 (complaining that BellSouth failed to provide a transport line, to "develop[] automated electronic interfaces," and "to develop any mechanism by which Covad can offer an existing BellSouth ADSL customer a seamless transfer to Covad."). The antitrust laws do not require this. *See* 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 773e, at 214 ("No case has suggested that the monopolist must build new capacity to satisfy a would-be sharer."). The 1996 Act may require such alterations, but that is another matter. The antitrust laws do not require BellSouth to promptly develop software and modify its facilities in order to meet Covad's business needs. Nor do the antitrust laws require, as Covad complains, that BellSouth add personnel to its wholesale division in order to meet BellSouth's regulatory obligations.

2. The Refusal-to-deal Doctrine

The refusal-to-deal doctrine is unavailing for the same reasons that its cousin, the essential facilities doctrine, is unavailing. Because this doctrine of forced-access is used for the same purpose as the essential facilities doctrine, all of the

problems discussed above apply. If one persists on using a different analytical hat for essentially the same conduct, however, none of the refusal-to-deal cases countenance the bold extension proffered by the panel. The touchstone refusal-to-deal case is the much-criticized *Aspen Skiing*, *supra*. Liability was imposed in that case because the defendant terminated a mutually beneficial, pre-existing business arrangement. The case hinged on the fact that Aspen did not engage in "competition on the merits"; rather, it chose to forego "short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Aspen Skiing*, 472 U.S. at 610-11, 105 S.Ct. at 2861. In this case, there was no preexisting business arrangement that BellSouth once thought to be mutually beneficial. Moreover, Covad cannot possibly claim that the obligation it seeks to impose with the antitrust laws – forced sharing – serves BellSouth's interests. Its decision not to share is perfectly legitimate competition on the merits.

B. The Undermining of the 1996 Act

The position taken by the panel – namely, that the 1996 Act does not require obligations above and beyond those required by the antitrust laws but rather overlaps with the antitrust laws – results in a regulatory scheme that is in considerable tension with the regulatory scheme envisioned by Congress. First, the panel's holding makes the 1996 Act's post-agreement enforcement scheme a nullity. This is because breach-of-contract claims would become secondary to antitrust claims, and the contract claims would be adjudicated under the supplemental jurisdiction of federal district courts (rather than by state courts or PSCs). Why would a CLEC ever sue only in contract when it can jettison the regulatory scheme and sue for treble damages in federal court? After all, ILECS are all monopolists, and virtually anything they do that breaches an interconnection agreement can be the subject of an antitrust suit under the theory that the breach is done to protect the ILEC's market position.[17] On this point, I agree

[17] The panel maintained that before a complaint can pass Rule 12(b)(6) muster, it must allege more than monopoly power and breach of contract;

with the Seventh Circuit that "[t]he elaborate system of negotiated agreements and enforcement established by the 1996 Act would be brushed aside by any unsatisfied party with the simple filing of an antitrust action." *See Goldwasser*, 222 F.3d 390, 400-01 (7th Cir.2000).

Second, the panel's holding undermines Congress's efforts to place regulatory authority in the hands of the FCC – an expert agency – rather than the courts. Prior to the panel's decision, the FCC (and, to some extent, PSCs) had exclusive authority to implement the 1996 Act's interconnection and unbundling requirements. If the panel is correct in its conclusion that Covad has made out an antitrust claim under the essential facilities doctrine, will federal district courts issue injunctions[18] requiring ILECs to undertake obligations above and beyond those required by the 1996 Act? Even if district courts refrain from issuing forced-access injunctions (with their concomitant price terms) under the theory that regulatory bodies have already been established to set interconnection terms and UNE rates, courts will no doubt enjoin ILECs from engaging in future anticompetitive behavior. And since the claims of anticompetitive conduct made by CLECs will essentially track the many contractual obligations that ILECs must undertake pursuant to their interconnection agreements,[19] the district courts will essentially oversee ILEC compliance under their contempt power. For every alleged violation of an interconnection agreement, the ILEC will have to show cause why it should not be held

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it must also allege that the defendant engaged in conduct "with an intent to monopolize." I cannot think of a situation, however, in which an ILEC would be liable in breach and yet a creative plaintiff's lawyer could not also allege that the breach was made with an eye toward benefitting the ILEC and thus preserving the ILEC's position in the relevant market.

[18] Covad did not specifically ask for injunctive relief in is complaint, although it requested "[s]uch other relief as the Court deems just and proper."

[19] In this case, for example, the alleged anticompetitive acts of BellSouth could easily be mistaken for breaches of the Covad/BellSouth interconnection agreement.

in contempt and sanctioned. Thus, the federal courts will be charged with closely monitoring ILEC compliance with the many requirements of the ILEC/CLEC interconnection agreements. This was not what Congress envisioned when it replaced Judge Greene with the FCC.

III. Price Squeeze

The panel's holding that Covad's "price squeeze" claim is cognizable under the antitrust laws is suspect because, as the district court noted, there is no allegation that BellSouth set below-cost retail prices for its DSL services. The wholesale prices that BellSouth charges are set by state commissions or by voluntary agreement; that is, a CLEC either agrees to the wholesale price and cannot be heard to complain, or else the wholesale rate is nondiscretionary. Covad has a remedy for its claim that the state commission set a wholesale rate that was too high: judicial review under 47 U.S.C. § 252(e)(6).[20] It cannot acquiesce in the state commission's wholesale rate and turn around and sue BellSouth because BellSouth is not charging consumers enough at retail. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223, 113 S.Ct. 2578, 2588, 125 L.Ed.2d 168 (1993) (rejecting "the notion that above-cost prices that are below . . . the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws"). If the district court grants injunctive relief, will it order BellSouth to charge Covad a wholesale price that is lower than that set by the state commission? Will it order BellSouth to charge DSL customers a price that is higher than the present price (even though the present price is presumably above cost)? Assuming Covad's allegations are true, what should BellSouth have charged DSL customers in hindsight? I can think of nothing more antithetical to the consumer welfare aims of antitrust law, and to FCC efforts to hasten the rollout of broadband services, than to send the message that ILECs should charge DSL customers prices

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[20] This is true if the BellSouth/Covad agreement was the product of arbitration before the PSC. It is unclear from the complaint whether the agreement was voluntary or arbitrated.

that are not only above cost, but substantially above cost so that CLECs can have large profit margins. There is nothing "factual" about this claim that must await summary judgment. The law simply does not recognize the alleged facts as an actionable price squeeze.

IV. Conclusion

Much more could be said about the panel opinion, such as (1) when it was issued, two of the key decisions it relied on (*BellSouth*[21] and *Consolidated Gas*) had been vacated; (2) the panel set up a straw man with its belabored argument in support of the unexceptional proposition that "in enacting the 1996 Act, Congress did not explicitly supersede the salience of the antitrust laws in the telecommunications industry,"[22] *Covad*, 299 F.3d at 1280; and (3) the decision will trigger an avalanche of complex litigation in the district courts.[23] I stop

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[21] *See Bellsouth Telecomm., Inc. v. MCImetro Access Transmission Servs. Inc.*, 278 F.3d 1223 (11th Cir.2002).

[22] The panel made this argument in the context of its discussion of the 1996 Act's antitrust savings clause. *See* Telecommunications Act of 1996 § 601(b)(1), codified at 47 U.S.C. § 152 note ("[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of the antitrust laws."). No one has ever contended that "in enacting the 1996 Act, Congress did not explicitly supersede the salience of the antitrust laws in the telecommunications industry." Judge Wood of the Seventh Circuit, who is a former antitrust professor and high-ranking attorney with the U.S. Department of Justice Antitrust Division, never made that argument. Neither do I. Rather, we contend that the 1996 Act established a regulatory scheme that went beyond anything required by the antitrust laws. It is likely that Congress perceived the 1996 Act as imposing *additional* obligations, and that Congress therefore wanted to bring home the point that pre-1996 obligations under the antitrust laws continue to have vitality in the post-1996 world. The panel, on the other hand, evidently believes that the 1996 Act is merely a more specific application of the forced-accessed requirements that ordinarily would be required by the antitrust laws.

[23] This proposition stems from several observations. First, there are thousands of interconnection agreements and thus potentially thousands of *Covad*-like antitrust cases lurking across the Circuit (and, indeed, the United States). Second, many parties will be involved in the litigation. In *Goldwasser*, for example, consumers (not CLECs) were the plaintiffs.

with the antitrust issues, however, because that is where the panel opinion wreaks the most havoc on the law. First, the decision thwarts Congress's chosen regulatory scheme. In the states of Florida, Georgia, and Alabama, CLECs will have no incentive to use the post-agreement enforcement process envisioned by the 1996 Act. From now on they will simply run to federal court, seeking treble damages and injunctions that are potentially inconsistent with the 1996 Act's requirements.[24] Along the way, regulation of the telecommunications industry will shift from the FCC back to the federal courts. Although Judge Greene may not have had the expertise of the FCC, at least the public law litigation he presided over involved a single monopolist (AT&T) and the government rather than what will ensue in the wake of the panel's ruling: multiple private disputes. And at least at the time of the AT&T litigation, Congress had not explicitly chosen to vest the FCC with the regulatory authority assumed by Judge Greene. The panel thus undermines the wishes of Congress – first by getting the federal courts into the business of micromanaging ILEC compliance with interconnection agreements, and second by enabling CLECs to sidestep the

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There might well be multiple consumer class actions in future cases. Moreover, the panel's "price squeeze" holding, which will compel BellSouth to raise the retail price of its DSL service, will affect existing contracts. DSL customers must therefore be joined as indispensable parties – possibly in the form of another class action. If one adds to this picture the problem of apportioning damages, *see, e.g.*, *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1451-52 (11th Cir.1991), and the issue of state court proceedings (which obviously cannot be consolidated), then the drain on scarce judicial resources becomes apparent. I do not suggest that otherwise meritorious lawsuits should be dismissed merely because their complexity will drain judicial resources; rather, I contend that the drain ought to at least provoke a second look as to whether these suits are really meritorious in the first place.

[24] CLECs also have an incentive to delay the negotiation of interconnection agreements, for any damages CLECs sustain because of an ILEC's failure to yield access to its network will potentially be subject to trebling by a district judge.

1996 Act's regulatory scheme with the filing of antitrust suits.

The panel also embarked upon a new journey in antitrust law, the likes of which have not been seen since the inconsistent and discredited antitrust jurisprudence of the Warren Court era embodied by cases such as *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L. Ed.2d 510 (1962) ("It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."). *See generally* Robert Bork, *The Antitrust Paradox: A Policy at War With Itself* (rev. ed.1993). The panel's novel extension of the essential facilities doctrine, for example, will enable any new entrant to tap the assets of its (monopolistic) horizontal competitor if the assets are "essential" for the new entrant to compete. This broad principle has never been the law. In the same vein, the panel decision will force ILECs to raise the retail prices of DSL services or else face "price squeeze" claims – even if the ILEC already prices its DSL services above cost and even though the FCC has been eager to hasten deployment of broadband technology rather than decrease it.

The aftershocks of the panel opinion well be felt far beyond the telecommunications industry. Are all firms that traditionally have been thought to be natural monopolies, such as pipeline companies and energy producers, now supposed to let competitors resell their assets, with the incumbent monopolists having the additional duty to charge their customers a price that is high enough so that new entrants can have hefty profit margins? After all, the panel purported to apply general principles of antitrust law to the facts of the case; there is nothing that is telecom-specific in its holding.

Rule 35(b) of the Federal Rules of Appellate Procedure instructs that cases to be heard en banc are those which

"present a question of exceptional importance." The panel decision – traveling on an Eleventh Circuit essential facilities case that has been vacated by the Supreme Court – departs from settled antitrust doctrine, undermines the operation of 1996 Act, and invites the filing of hundreds of complex cases in the district courts throughout the circuit.[25] This case is extremely important. Accordingly, I am compelled to dissent from the court's failure to reconsider the case en banc.

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[25] I suggest that CLECs filing suit against BellSouth in the district courts of the Fourth, Fifth, and Sixth Circuits may invoke the doctrine of collateral estoppel in response to BellSouth's argument that federal antitrust claims such as those Covad presents in this case are not cognizable under section 2 of the Sherman Act. In short, the panel's decision is not only of "exceptional importance" in the Eleventh Circuit, it will be of importance to the courts and litigants in these other circuits as well.

APPENDIX D

Statutory Provisions Involved

1. Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. Section 251 of the Communications Act of 1934, as amended by § 101(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 61, provides:

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of

such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering Administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone

company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification –

(A) is necessary –

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to

such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that –

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if –

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

3. Section 251 of the Communications Act of 1934, as amended by § 101(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 66, provides:

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning –

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such informa-

tion as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject –

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that –

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of

this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of state commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any

party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission –

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such para-

graph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

4. Section 601(b)(1) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 143, codified at 47 U.S.C. § 152 note, provides:

Applicability of Consent Decrees and Other Law

* * * * *

(b) Antitrust Laws. –

(1) Savings clause. – Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

* * * * *

Supreme Court, U.S.
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No. 02-1423

IN THE

Supreme Court of the United States

BELLSOUTH CORPORATION and
BELLSOUTH TELECOMMUNICATIONS, INC.,

Petitioners,

v.

COVAD COMMUNICATIONS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent submits that the following question more accurately reflects the issue presented by the ruling below:

> May a facilities-based competitive local exchange carrier state an antitrust claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, against an incumbent local telephone monopolist based on allegations of exclusionary conduct even if some of that conduct also violates the Telecommunications Act of 1996, 47 U.S.C. §§ 151, *et seq.*?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Covad Communications Company states that it has the following parent corporation:

Covad Communications Group

Covad Communications Group is the only publicly held company that owns 10% or more of Covad Communications Company's stock.

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Respondent Covad Communications Company ("Covad") respectfully requests that the Court grant the Petition for a Writ of Certiorari filed by petitioners BellSouth Corporation and BellSouth Telecommunications, Inc. (collectively "BellSouth") and that the Court deny BellSouth's request to hold this case pending resolution of *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, cert. granted*, 123 S. Ct. 1480 (March 10, 2003) (No. 02-682) ("*Trinko*"). In the alternative, Covad respectfully requests that the Court deny BellSouth's petition in its entirety.

COUNTER-STATEMENT OF THE CASE

A persistent pattern of anticompetitive conduct has hampered the telecommunications industry in its efforts to achieve the goal of increased competition in all markets that Congress sought when it passed the landmark Telecommunications Act of 1996, 47 U.S.C. §§ 151, *et seq.* Incumbent local telephone monopolists including Verizon and BellSouth have manipulated the regulatory and competitive landscapes in order to protect their long-sanctioned, rate-payer funded monopolies over local telephone service. The Second Circuit's decision in *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), *cert. granted, sub nom. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 123 S. Ct. 1480 (March 10, 2003) (No. 02-682) addresses some of that behavior, albeit in the context of the end-user customers of those companies who compete with Verizon by reselling its local service offerings. The claims raised by *Trinko* are, without a doubt, serious and should be addressed by this Court.

But the incumbent local telephone monopolists have also been engaged in conduct that has more far-reaching, and

ultimately more serious anticompetitive effects than merely retaining their historic, local telephone monopolies. They have manipulated and extended their traditional local service monopolies so as to dominate new, innovative markets, markets that depend on access to the local telephone network in order to provide competing services in downstream markets. They have succeeded dramatically, driving many competitors out of business altogether, and severely limiting consumer choice in such markets, including especially the markets for local Internet access in which Covad competes. That type of effort to extend a monopoly from one market to another is not squarely presented in *Trinko*, but is the very core of Covad's claims against BellSouth, as recently analyzed and approved of by the Eleventh Circuit.

Simply put, *Trinko* is not the proper vehicle by which to resolve the weighty issues Verizon (and the United States, which filed an *amicus curiae* brief in support of Verizon's petition for a writ of certiorari) seek to raise. Verizon criticizes the *Trinko* complaint as too conclusory, but tries to use *Trinko*'s relatively narrow claims to change the antitrust rules governing the entire telecommunications industry — indeed, potentially well beyond that industry.[1] The Court should reject that attempt; if the Court wishes to address the broader issues Verizon and the United States argue, it should consolidate Covad's claims against BellSouth and consider them together with *Trinko*.

Both Covad's claims and those presented in *Trinko* conflict with the Seventh Circuit's decision in *Goldwasser v. Ameritech*, 222 F.3d 390 (7th Cir. 2000), and both deserve

1. The incumbent local telephone monopolists may see a tactical advantage in proceeding in this fashion. While Verizon promptly petitioned for review of the Second Circuit's ruling in *Trinko*, BellSouth, represented by the same law firm, waited until the last possible day to file their petition for review of the Eleventh Circuit's decision.

to be resolved by this Court. But they are not the same claims and, so, each requires consideration. Covad, because it is a facilities-based competitor of BellSouth in a downstream market,[2] as well as BellSouth's direct customer, stands in a different position from an antitrust standpoint than the indirect customers of Verizon who are the plaintiff class in *Trinko*. All such indirect customer claims, in the end, derive from the anticompetitive conduct the incumbent local telephone monopolists have targeted at their direct customer/ competitors, like Covad. Logically, the consumers' derivative claims should not be heard in isolation from the direct competitor claims from which they derive. The Court will best serve the overall public interest, and in particular the overall interests of the telecommunications industry, by considering the claims of Covad together with the indirect customer claims of the *Trinko* plaintiffs.

A. Covad's Complaint and the Relevant Markets[3]

In an effort to make it appear that the Court's ruling in *Trinko* will likely resolve all of Covad's claims, BellSouth

2. A "facilities-based" competitor is one which does not merely obtain from the incumbent provider all needed elements of the services it provides, but makes significant capital investments in its own network elements (though it may still obtain some elements from the incumbent). *See, e.g.*, 47 U.S.C. § 271(c)(1)(A). Covad has invested heavily in its own network facilities designed to provide digital subscriber line ("DSL") service. To use these facilities requires receiving a signal over the ordinary local loops that connect homes and businesses to telephone central offices.

3. Because this case was decided on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the facts must be taken as alleged in Covad's complaint. *Swierkewicz v. Sorema N.A.*, 534 U.S. (Cont'd)

trivializes Covad's allegations and the Eleventh Circuit's ruling by improperly substituting its characterizations for the record. BellSouth argues that Covad's allegations and theories are "indistinguishable" from those presented by the end-user class plaintiffs in *Trinko* and *Goldwasser*. (Pet. 8) But they are not the same; Covad's claims are far more direct and substantial, present issues not present in *Trinko* at all, and overall present a superior vehicle for addressing the issue of the proper role of antitrust enforcement in the deregulated telecommunications industry.

BellSouth distorts the context of Covad's claims at the outset, asserting that Covad's theory is that BellSouth violated the antitrust laws by "failing to carry out with sufficient speed and efficiency its *regulatory obligations*" under the Telecommunications Act of 1996 (the "1996 Act"). (Pet. 2 (emphasis in original)) That is not Covad's claim. Covad is not complaining about mere inefficiency by BellSouth, nor mere regulatory nits. To the contrary, Covad pleaded in great detail an intentional scheme by BellSouth to manipulate its position as the incumbent local telephone monopolist into control over local Internet access markets, and continued dominance over the local telephone service market, by excluding Covad from access to essential elements of BellSouth's local network. The real question presented by this case — but not squarely presented in *Trinko* — is whether a monopolist may evade antitrust liability for that

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(Cont'd)

506, 508 n.1 (2002); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515-16 (1972). The so-called "facts" asserted in BellSouth's petition, many of which differ from the allegations of Covad's complaint, thus were not considered by the lower courts, are not part of the record in this case, and can provide no basis on which to frame the issues before this Court.

type of classic, exclusionary conduct, merely because that conduct also happens to violate another federal statute, the 1996 Act.

This is not a case about whether BellSouth failed to attend to regulatory technicalities with sufficient dispatch. Taking Covad's allegations as true (which BellSouth fails to do in its statement of the case), BellSouth engaged in egregious exclusionary conduct with no possible legitimate purpose, including: precluding interconnection via false statements that no space was available for collocation of Covad's equipment in central offices, thus foregoing rents it could have earned from that available space (Complaint, ¶¶ 47-49); foreclosing competition through extensive and unjustified delays and conditions even when grudgingly providing collocation, again at the sacrifice of rents Covad was ready and willing to pay (Complaint, ¶¶ 50-60); enacting unexplained and unnecessary changes in its normal business practices designed solely to frustrate Covad's market entry (Complaint, ¶¶ 61-64); refusing to lease loops to Covad — based on BellSouth's decision, contrary to industry standard, that they are "too long" — despite Covad's willingness and ability to pay for and use the otherwise unutilized loops (Complaint, ¶¶ 75-83); and refusing line-sharing so as to raise its rival's costs and implement a price squeeze with regard to the otherwise unused data bandwidth of its local loops (Complaint, ¶¶ 84-90). That conduct served no regulatory purpose, indeed, no purpose at all except to exclude competition.

BellSouth similarly distorts Covad's complaint by misstating Covad's definition of the relevant markets in which the parties compete. Ignoring Covad's complaint, BellSouth suggests that Covad defined the markets as "high-speed Internet access" markets and claims to have no power

in those markets. (Pet. 3, 12) In reality, the relevant markets properly include all means of Internet access; BellSouth dominates those markets, which are highly localized, with a variety of products, including dial-up telephone Internet access, still the predominant means of reaching the Internet. (Complaint, ¶¶ 17-24) BellSouth's attempt to rewrite the market definitions, and to argue that it has no market power (Pet. 12) is just one striking example of its disregard for the procedural posture of this case, which was decided on a Rule 12 motion.

B. Proceedings Below

This case, like *Trinko*, is before the Court as the result of a motion to dismiss brought under Rule 12 of the Federal Rules of Civil Procedure. BellSouth moved to dismiss Covad's claim, in its entirety, claiming Covad's allegations, taken as true, could not state any cognizable claim as a matter of law. The United States District Court for the Northern District of Georgia agreed, and dismissed Covad's claims. The Eleventh Circuit disagreed, and reversed, reinstating Covad's claims. BellSouth misstates the Eleventh Circuit's holding below in at least three important respects.

First, BellSouth asserts that the Eleventh Circuit held that Covad need not prove exclusionary conduct, so long as it pleaded that BellSouth acted with anticompetitive intent. (Pet. 16) BellSouth arrives at this conclusion by ignoring the Eleventh Circuit's true holding, and presuming that it was Covad's duty, in its complaint, to anticipate and refute every purportedly "legitimate" business justification BellSouth might proffer. The Eleventh Circuit, relying on this Court's decision in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483-84 (1992), simply

rejected BellSouth's attempt to shift the burden of proof concerning legitimate business justifications for its conduct: "Here, on motion to dismiss, there is no proffered legitimate business justification for Covad to refute, so the absence of specific factual allegation is irrelevant." (Pet. App. A at 23a n.15) That decision was clearly correct, under this Court's consistent precedent — it is not Covad's burden to disprove BellSouth's business justifications before they are offered. As the Court held in *Kodak*, "[i]f Kodak adopted its [challenged] policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2." 504 U.S. at 483 (citations omitted). BellSouth's right to refuse to deal, even with competitors, "is not absolute; it exists only if there are legitimate competitive reasons for the refusal." *Id.* at 483 n.32 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-05 (1985)); *accord United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (refusals to deal acceptable only "[i]n the absence of any purpose to create or maintain a monopoly"). BellSouth bears the burden of showing such reasons motivated its conduct. *Nat'l Communications Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 131 (2d Cir. 2001) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-09 (1985)); *see also LePage's Inc. v. Minnesota Mining and Mfg. Co.*, __ F.3d __, 2003 WL 1480498, at *20 (3d Cir. Mar. 25, 2003) ("The defendant bears the burden of 'persuad[ing] the jury that its conduct was justified by any normal business purpose'"); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (*en banc*), *cert. denied*, 534 U.S. 952 (2001) ("if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a 'pro-competitive justification' for its conduct"). BellSouth cannot support an interpretation of "exclusionary conduct" that shifts that burden to Covad.

Second, BellSouth claims the Eleventh Circuit established "expansive" new parameters for an essential facilities claim. (Pet. 6) In reality, the Eleventh Circuit did not create a new essential facilities standard. It recited the same four-element test that has been recognized by every Circuit: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of use of the facility to a competitor; and (4) the feasibility of providing the facility." (Pet. App. A at 17a) It also directly cited many of those decisions, and pointed out that BellSouth's main response was to criticize the essential facilities doctrine. (Pet. App. A at 18a) The Eleventh Circuit went on to hold that Covad's complaint fully alleged each of those four necessary elements. (Pet. App. A at 20a-21a and Complaint, ¶¶ 16, 25-26, 47-48, 77, 86, 111) Thus, this case is not a doctrinal outlier, it is a paradigm essential facilities claim. It is ideally situated for review at this time, so that the Court may reach the substantive issues raised by Verizon and the United States in *Trinko*. Indeed, as described below, because the complaint in *Trinko* does not as clearly plead an essential facilities theory, this case presents a far superior vehicle for reviewing such claims in the telecommunications industry.

Third, BellSouth suggests that Covad makes essentially the same allegations as the monopoly leveraging claim in *Trinko*. (Pet. 8-9) That is not so. While BellSouth is correct that a number of Courts of Appeal (including the Second and Eleventh Circuits) have held that a plaintiff may state a Section 2 violation by showing a monopolist utilized its monopoly over an upstream market to gain a "competitive advantage" in a downstream market, Covad's claim does not depend on such a rule. First, Covad unambiguously pleaded that BellSouth used its control over the upstream local

telephone network to gain a monopoly (or a dangerous probability of achieving one) in the downstream markets for local Internet access. (Complaint, ¶¶ 114-115, 119) That type of conduct, extending one monopoly to gain another, is accepted even by the Courts of Appeals decisions cited by BellSouth, which do not accept the "competitive advantage" standard. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992).

Second, in this case the upstream market *is* regulated. Thus, BellSouth's attempt to use its control over the local telephone network, funded for decades by rate-payers captive to a state-granted monopoly, to prevent downstream competition presents the "special problem" long recognized by antitrust law as "posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that the regulation forbids at the first." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 29 (1st Cir. 1990) (Breyer, J.).

Thus, to the extent that the Second Circuit's decision in *Trinko* is based on a more expansive reading of monopoly leveraging as a Section 2 violation, consolidation of this case with *Trinko* will provide the Court the opportunity to provide greater clarity to the lower courts, and to the telecommunications industry.

REASONS FOR GRANTING THE PETITION

The telecommunications industry has been immersed in uncertainty since the Seventh Circuit's decision in *Goldwasser* three years ago. Across the country, incumbent local monopolists like BellSouth relied on *Goldwasser* to

assert that the 1996 Act absolutely precluded any claim that they had violated the antitrust laws in their interactions with competitors. The district courts were split in their treatment of that defense, though a majority simply followed *Goldwasser* and dismissed competitor's claims.[4] Now, three other Courts of Appeal have considered and rejected *Goldwasser* and have held competitors may state an antitrust claim based on conduct that also implicates the 1996 Act. *Trinko*, 305 F.3d at 108; *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002); *MetroNet Servs. Corp. v. US West Communications*, __ F.3d __, No. 01-35406, 2003 WL 1618668 (9th Cir. Mar. 31, 2003). This Court has decided to review one of those decisions, the Second Circuit's ruling in the *Trinko* end-user class action case. 123 S. Ct. 1480 (March 10, 2003).

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4. *See, e.g.*, *Covad Communications Co. v. Bell Atlantic Corp.*, 201 F. Supp. 2d 123 (D.D.C. 2002) (dismissing based on *Goldwasser*); *Cavalier Telephone, LLC v. Verizon Virginia Inc.*, 208 F. Supp. 2d 608 (E.D. Va. 2002) (same); *MGC Communications, Inc. v. BellSouth Telecommunications, Inc.*, 146 F. Supp. 2d 1344 (S.D. Fla. 2001) (same); *Intermedia Communications Inc. v. BellSouth Telecommunications, Inc.*, 173 F. Supp. 2d 1282 (M.D. Fla. Dec. 15, 2000) (same); *Supra Telecommunications & Information Sys., Inc. v. BellSouth Telecommunications, Inc.*, No. 99-1706-SEITZ (S.D. Fla. June 6, 2001) (same); *Building Communications, Inc. v. Ameritech Servs., Inc.*, No. 97-CV-76336, 2001 WL 1525268 (E.D. Mich. June 21, 2001) (same); *see contra Ohio Bell Telephone Co. v. CoreComm Newco, Inc.*, 214 F. Supp. 2d 810 (N.D. Ohio 2002) (permitting Section 2 claim based on 1996 Act violations); *Davis v. Pacific Bell*, 204 F. Supp. 2d 1236 (N.D. Cal. 2002) (same); *Stein v. Pacific Bell*, 173 F. Supp. 2d 975 (N.D. Cal. Feb. 14, 2001) (same); *Electronet Intermedia Consulting, Inc. v. Sprint-Florida, Inc.*, No. 4:00-CV-176-RH (N.D. Fla. Sept. 20, 2000) (same); *MGC Communications Inc. v. Sprint Corp.*, No. CV-S-00-948-PMP (D. Nev. Dec. 12, 2000) (same); *Bell Atlantic Network Servs., Inc. v. Ntegrity Telecontent Servs., Inc.*, Civ. No. 99-5366-AET (D.N.J. Oct. 31, 2000) (same).

The Court should also grant review in this case, and consolidate it with *Trinko* for argument. Covad's case against BellSouth, because it is an action by a direct, facilities-based competitor of an incumbent local telephone monopolist, adds important factual and legal elements missing from *Trinko*. Consideration of Covad's claims at the same time as *Trinko* will best assure that the *Goldwasser*-inspired uncertainty is removed from the telecommunications industry, so that both incumbent monopolists and competitors will know with clarity their rights and obligations under the antitrust laws.

Thus, Covad supports BellSouth's petition, to a point: the Court should grant the petition and consolidate this case with *Trinko* to the extent the Court intends: (1) to determine the interplay of the 1996 Act and the Sherman Act; and/or (2) more generally to determine the proper parameters of Section 2 claims in the telecommunications industry (as requested by both Verizon and the United States). There is, however, no reason to hold BellSouth's petition pending resolution of *Trinko*. If the Court wishes to reach the merits of the *Goldwasser*-related arguments, consolidating this case with *Trinko* will advance that goal. If the Court is not going to reach the antitrust merits of *Trinko*, it should simply deny BellSouth's petition altogether, and permit Covad to proceed with its claims against BellSouth without further delay. There is no benefit to anyone in merely holding BellSouth's petition.

A. Covad Is A Direct Customer and Competitor With No Standing Issues

The status of the plaintiffs is a key distinction between Covad's claims and those presented in *Trinko*. The putative class in *Trinko* consists entirely of indirect customers of the incumbent monopolist, Verizon — that is, customers who succeeded in obtaining local telephone service from one of Verizon's competitors. *Trinko*, 305 F.3d at 92 ("a class consisting of customers who received local phone service in the region served by Bell Atlantic from a company other than Bell Atlantic"). The plaintiffs' claimed injury is that because Verizon did not "provide equal access" to its local telephony reseller competitors, the plaintiffs "received poor local phone service." *Trinko*, 305 F.3d at 95. As a result, Verizon has argued and continues to argue before this Court that the plaintiff class members have suffered at most "indirect" harm and so lack standing to pursue antitrust claims against Verizon. (*See* Petition for a Writ of Certiorari, No. 02-682 ("*Trinko* Pet.") at 24 ("the alleged injury here should have been barred as indirect, deriving from harm to the direct customer"))

Covad does not ascribe any merit to Verizon's standing argument. But as BellSouth recognizes (Pet. 9-10) the mere existence of that standing challenge creates a substantial risk that the Court could resolve *Trinko* without resolving the antitrust merits. If the Court determined the *Trinko* class plaintiffs lacked standing, it would have no reason to proceed further and reach the important issues framed by both Verizon and BellSouth in their respective petitions. *See, e.g.*, *Steel Co. v. Citizens For A Better Env't*, 523 U.S. 83, 110 (1998) (declining to review merits having found no standing: "However desirable prompt resolution of the merits EPCRA

question may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers."). If the Court consolidates Covad's claims with *Trinko*, it will eliminate that risk. As BellSouth noted, "Covad is a competitor of BellSouth, and not a competitor's customer, and the merits issues are squarely presented." (Pet. 10) BellSouth has not raised any challenge to Covad's standing, so its claims would be decided solely on the merits "squarely framed" by its complaint.

B. Covad Is A Facilities-Based Competitor, Not A Reseller

Even in the absence of any standing issues, the Court should consolidate Covad's claims for review together with *Trinko*. Even if the plaintiff in *Trinko* had been AT&T, the competitive local carrier that dealt directly with Verizon, rather than a group of AT&T's customers, Covad's claims would still more squarely frame the issues Verizon, BellSouth and the United States seek to have this Court address. Because Covad is a facilities-based DSL provider, rather than a local telephony reseller like AT&T, it presents stronger and clearer claims of denial of essential facilities and extension of a monopoly into a second market. Consolidation of Covad's claims for consideration now will ensure that the Court's decision provides greater clarity to a broader spectrum of telecommunications providers.[5]

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5. Covad does not suggest that resellers cannot state viable Section 2 claims based on exclusionary conduct by incumbent local telephone monopolists. To the contrary, resellers may be able to show that the monopolists have extended their monopolies from one market to another, and may be able to show that they have been denied access to essential facilities. But all facilities-based competitors who have been excluded from competing in downstream markets will directly and necessarily present such claims.

1. Covad pleads extension of a monopoly into a second market

As the Eleventh Circuit recognized, from an analytical perspective, all of Covad's Section 2 claims may be characterized as one means or another of extending a monopoly into a second market. (Pet. App. A at 16a) That is because Covad is both a competitor and customer of BellSouth, a vertically integrated monopolist. As in the seminal Section 2 "price squeeze" case of *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), Covad buys essential inputs from a monopolist in an upstream market, and uses those inputs to compete with that vertically integrated monopolist in a separate, downstream market. Here, the upstream market is the local telephone network, completely dominated by BellSouth. Covad is not seeking simply to take that network and resell it, however. Instead, just as the competitors in *Alcoa* purchased aluminum ingots to make aluminum sheet, Covad leases elements of BellSouth's network, combines them with its own facilities, and produces a new service, DSL, which competes with BellSouth in another market, the market for local Internet access. *Compare Alcoa*, 148 F.2d at 437-38, *with* Complaint, ¶¶ 25-26, 91.

BellSouth attempts to minimize the significance of Covad's claim that BellSouth has used its monopoly in one market to create a monopoly in another by suggesting Covad is merely asserting the same theory advanced in *Trinko*. BellSouth implies that the Eleventh Circuit accepted a Covad theory that BellSouth violated Section 2 by merely attempting to use its upstream monopoly power to gain some advantage — though short of a monopoly or even an attempt at one — in the downstream local Internet access markets. That is not

what Covad alleged, nor is it what the Eleventh Circuit held. Covad's monopolization claim expressly alleged that BellSouth used its power over the local telephone network to "maintain and extend" the monopoly power it already possesses in the local Internet access markets. (Complaint, ¶¶ 114-15) Covad's attempted monopolization claim alleged that BellSouth has "demonstrated a dangerous probability of success in its efforts to gain, perpetuate or enhance" a monopoly in those local Internet access markets. (Complaint, ¶¶ 118-19) In short, Covad's Section 2 claims do not invoke, much less depend upon, the "competitive advantage" theory BellSouth disparages in its petition.

The Eleventh Circuit clearly understood Covad's allegations, and did not analyze Covad's claims under the lower threshold "competitive advantage" monopoly leveraging standard. To the contrary, it relied upon this Court's ruling in *Kodak* that a Section 2 claim may exist "where a defendant used its control over one market *to gain dominance* in another market." (Pet. App. A at 16a (emphasis added); *see also* Pet. App. A at 24a ("a vertically integrated monopolist that refuses to deal with a customer *to foreclose competition* in a second market may violate Section 2") (emphasis added)).

The Eleventh Circuit's analysis is thus different from the Second Circuit's monopoly leveraging analysis in *Trinko*, which without detailed discussion unambiguously adopted the more permissive "competitive advantage" standard. *Trinko*, 305 F.3d at 108.[6] If the Court were to resolve the

6. As a starting point, it is not clear the plaintiffs in *Trinko* pleaded a monopoly leveraging theory. As the District Court decision in this case noted, claims by local telephone resellers' customers arguably do (Cont'd)

merits of *Trinko*'s monopoly leveraging claim on the basis of the "competitive advantage" standard alone, it could allow incumbent local monopolists to continue to frustrate competition while arguing that well-accepted monopoly-to-monopoly claims such as Covad's are invalid in this industry. The Court should consolidate Covad's claims with *Trinko* to avoid the necessity of piecemeal rulings concerning the parameters of monopoly conduct in the telecommunications industry. Consolidation will allow the Court to examine both "competitive advantage" and monopoly-to-monopoly claims at the same time, in the same industry.

2. Covad presents a paradigm essential facilities claim

Covad also presents an essential facilities claim distinct from the claims asserted in *Trinko*, which provides an additional reason to grant BellSouth's petition and consolidate the two cases.

BellSouth and Verizon criticize the essential facilities doctrine at length (*See, e.g.*, Pet. 13-15; *Trinko* Pet. 16-18) but cannot dispute that all twelve Courts of Appeal recognize the doctrine, and agree as to its elements.[7] The United States

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(Cont'd)

not involve "a secondary market" so as to implicate leveraging theory at all. (Pet. App. B at 55a) Rather, *Trinko*, like *Goldwasser*, simply involved a claim of monopolization of a single market, the local telephone service market. *Id.* Even if *Trinko* invokes monopoly leveraging, however, it is clearly a different species than Covad's theory in this case, as the Eleventh Circuit's analysis confirms.

7. *See, e.g., Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Interface Group, Inc. v.*

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described the principle behind "the leading case," the Seventh Circuit's decision in *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983): "a monopolist may be required to assist rivals by sharing a facility if the monopolist can 'extend monopoly power from one stage of production to another.'" (Brief For The United States And The Federal Trade Commission As Amici Curiae, No. 02-682 ("*Trinko* Amicus Brief") at 12)[8]

Covad's essential facilities claim fits perfectly the *MCI* essential facilities test and presents the doctrine for review

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Massachusetts Port Auth., 816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Advanced Health-Care Servs. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *Mid-Texas Communications Sys., Inc. v. AT&T Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992), *cert. denied*, 506 U.S. 908 (1992); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1285-88 (11th Cir. 2002); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-57 (Fed. Cir. 1999).

8. Covad's claims are even stronger than the type of claim the United States cites, because Covad is not seeking "assistance" from its rival, nor to "share" anything with BellSouth. Rather, BellSouth is refusing to lease to Covad elements of its network that by definition it is not otherwise using, and from which it is not otherwise deriving the income Covad would provide.

more squarely than the complaint in *Trinko* does. *MCI* distinguished between two sets of demands for network access by MCI. The Seventh Circuit found MCI stated an essential facilities claim when it sought access to elements of AT&T's monopoly local telephone network that could not reasonably be duplicated, in order to use those elements to provide a separate and distinct product, long distance service. *MCI*, 708 F.2d at 1132-33. By contrast, the Seventh Circuit found MCI could not state a claim when it sought access to elements of AT&T's long distance network, in part because MCI could not show the elements it sought to lease were essential (MCI having shown the ability to duplicate them), 708 F.2d at 1148, and, given the elements were not essential, MCI could not claim a right to unfettered access to AT&T entire network merely to provide the same service AT&T was providing. *MCI*, 708 F.2d at 1149.

Verizon has focused on the latter component of the Seventh Circuit's analysis in isolation, to argue that there can be no essential facilities claim when the competitor merely provides the same service as the incumbent whose facilities it seeks to share. (*Trinko* Pet. 12 n.6 (referring to "the *rejected* (same-level, same-market) claim in *MCI*") (emphasis in original)) But that is not what *MCI* held, nor would it be a coherent result; if a plaintiff meets the four well-established elements of the essential facilities doctrine, there is no reason to import a new unspoken element that the competitor must participate at a different level of the market than the monopolist. But were the Court to accept Verizon's interpretation of *MCI*, the Court could resolve the essential facilities claim on very narrow grounds applicable only to local service reseller competitors (those who participate, in Verizon's words, at the "same-market, same-level"). Such a ruling would provide no guidance for situations like Covad's, where the facility is essential to competition in a separate, downstream market.

Verizon also attacks the *Trinko* plaintiffs' essential facilities claim on the grounds that it does not claim a "*denial* of access or cessation of competition" but only challenges "the *terms* of access." (*Trinko* Pet. 13 (emphasis in original)) Again, Covad disagrees with Verizon's apparent formulation of the essential facilities doctrine. The lower courts have consistently recognized that the refusal to share an essential facility except on terms that are commercially unreasonable is equivalent to an outright denial of the facility, and suffices to state a claim. In the "leading case," for example, the Seventh Circuit found that "inappropriate or inefficient interconnections" sufficed to support a Section 2 violation. *MCI*, 708 F.2d at 1150-53; *see also* Pet. App. A at 19a-20a (citing cases from other Courts of Appeal holding that "Section 2 prohibits denial of access to essential facilities *on reasonable terms*") (emphasis in original). But Verizon's position again demonstrates the benefits of consolidating Covad's claims for consideration together with *Trinko*. While the *Trinko* complaint may be unclear on the subject of whether the denial of the essential facility was direct or merely constructive, there is no such doubt in Covad's complaint. Contrary to BellSouth's suggestion, as the Eleventh Circuit held, Covad has explicitly pleaded both forms of denial. (Pet. App. A at 20a-21a (Covad's "complaint does allege that BellSouth sometimes *denied access to its facilities outright* and other times denied access on reasonable terms") (emphasis added)) Thus, to the extent the Court determines that an outright denial of access is required to state an essential facilities claim, Covad's complaint more squarely presents an essential facilities claim for review.

3. Covad's price squeeze claim raises distinct and important issues

Covad's status as a facilities-based downstream competitor also creates an important distinction that affects the impact of regulation on Section 2 claims in the telecommunications industry — it gives rise to a price squeeze claim that the *Trinko* plaintiffs do not present. The Court should consolidate Covad's claims for consideration with *Trinko* to provide more complete guidance to telecommunications industry participants concerning their respective rights and obligations under Section 2.[9]

Ironically, though *Trinko* presents no price squeeze claim, Verizon relies heavily on the First Circuit's decision in *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), a price squeeze case. Verizon argues that *Town of Concord* stands for the proposition that the Court should determine, on a Rule 12 record, whether the *Trinko* plaintiffs seek to impose access obligations that would "*undermine* the goal of spurring *independent* investment." (*Trinko* Pet. 19-20 and 3 n.1 (emphasis in original)) Covad disagrees that this is an analysis that can be undertaken at the Rule 12 stage. It is clear that it is the "antitrust court" that "must consider the peculiarities of an industry as recognized in a regulatory statute," *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 742 (9th Cir. 1981) (Kennedy, J.), rather than simply deferring any such analysis to the regulatory administrators as Verizon

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9. BellSouth incorrectly criticizes the Eleventh Circuit's price squeeze ruling as "inconsistent with this Court's precedents." (Pet. 16) BellSouth cites no price squeeze ruling by this Court to support that assertion. But it demonstrates the need for the Court to bring clarity to this issue, which potentially affects all facilities based downstream competitors of incumbent local telephone monopolists.

suggests. (*Trinko* Pet. 21) And when the courts undertake that analysis, they must do so on an adequate factual record, not merely the incumbent local telephone monopolist's say so. But again, were the Court to accept Verizon's argument, the distinction between *Trinko* and Covad's claims is significant. Covad does not present the type of "same-market, same-level" claim disparaged by Verizon in *Trinko*. Rather, Covad buys inputs from BellSouth at regulated prices, then uses them to compete with a separate BellSouth product whose price is unregulated. This court has long recognized the anticompetitive incentives that type of market structure creates:

> In a regulated industry a firm with market power may be unable to extract a super-competitive profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated tied products or services.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36 n.4 (1984) (citation omitted). That rationale has been applied expressly to price squeeze allegations; *Town of Concord* recognized "that a special problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first." 915 F.2d at 29.

BellSouth's petition avoids dealing with the problem of its recognized economic incentive to engage in a price squeeze by mischaracterizing Covad's theory as a predatory pricing claim. Covad does not and need not assert a predatory pricing claim, as BellSouth assumes. (Pet. 17) This has been well-recognized since at least the time of *Alcoa*, which

involved no allegation of pricing below cost, but required only a showing that: (1) a firm has monopoly power over a product; (2) its price for that product is "higher than a 'fair price;'" (3) that product is required to compete in a second market where the monopolist itself competes; and (4) the monopolist's price in the second market is so low relative to the price in the first market that competitors cannot match it and still earn a "living profit." *Alcoa*, 148 F.2d at 437-38. The courts have expressly held that the monopolist's wholesale and retail prices may both be profitable, yet still result in an unlawful price squeeze. *See, e.g., City of Batavia v. FERC*, 672 F.2d 64, 90 (D.C. Cir. 1982); *Ray v. Indiana & Mich. Elec. Co.*, 606 F. Supp. 757, 776 (N.D. Ind. 1984), *aff'd*, 758 F.2d 1148 (7th Cir. 1985). In fact, the real evil of a price squeeze comes not from the level of the retail price in isolation, but because the wholesale price is set artificially high, and operates as a mechanism by which to raise rivals costs — a recognized form of anticompetitive conduct. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L. J. 209, 235-62 (1986). Allegations of raising rivals' cost "qualify as anticompetitive conduct" unless there is a "legitimate business justification for it." *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1553 n.12 (10th Cir. 1995); *see also* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 318-23 (2001) (discussing economic logic behind raising rivals' cost theory).

Thus, Covad's price squeeze claim presents, as BellSouth concedes, important questions concerning the impact of regulation on antitrust claims in the telecommunications industry. Those questions are different from and more

comprehensive than the issues presented in *Trinko*. To the extent the Court is going to consider the impact of 1996 Act regulation on Section 2 claims, it should consolidate Covad's claims for consideration with *Trinko*.

C. Covad's Detailed Complaint Will Assist The Court

Finally, consolidating Covad's case with *Trinko* will also help eliminate any risk that the Court's decision might turn in any way on perceived deficiencies in the pleadings. While Verizon has criticized the *Trinko* complaint for a perceived lack of detail, *see Trinko* Petition at 5 ("the complaint contained no specifics"), BellSouth — represented by the same lawyers as Verizon — concedes Covad's complaint is quite detailed. (Pet. 18 (complaining of "Covad's 240-paragraph complaint")) Because this case is being reviewed at the Rule 12 stage, the Court is already disadvantaged by the absence of a full factual record. To the extent the Court nonetheless wishes to reach the significant antitrust issues proffered by the United States and the incumbent local telephone monopolists, it should do so on the fullest factual record available: Covad's complaint.

REASONS FOR DENYING THE REQUEST TO HOLD THIS CASE

Whatever the scope of the Court's review of *Trinko*, there is no reason to accept BellSouth's request to hold this case until after *Trinko* is resolved.

If the Court is going to address the core antitrust issues as suggested by Verizon and the United States, it should address those issues in a manner that will provide guidance to as broad a sector of the telecommunications industry as

possible, and on allegations that squarely raise those issues. *Goldwasser* and its progeny have sowed uncertainty throughout the industry. The Court can most adequately provide much needed guidance concerning the issues raised by *Goldwasser* by addressing this case at the same time it considers *Trinko*. This case raises those issues even more squarely and will help bring clarity to a broader sector of the telecommunications industry. There is no benefit to holding this case while industry-wide issues are resolved.

There is also no purpose to holding this case if the Court is going to decide *Trinko* on more narrow grounds than those suggested by the United States, for example, the indirect purchaser standing issue raised by Verizon. Covad has already waited years to have its claims heard. Holding Covad's claims at a standstill serves no purpose but further delay. That delay will be highly prejudicial to Covad's claims, as the Court has noted in the analogous statute of limitations context. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 271 (1985) ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost.") Here, Covad has been forced to wait years, without the ability to conduct even the most rudimentary discovery. All the while, memories fade and witnesses move on with their lives, imperiling Covad's ability to prove its case. *See, e.g., Job Ax Swings At BellSouth*, ATLANTA JOURNAL-CONSTITUTION, March 18, 2003, at D1.

Finally, whether the Court reviews *Trinko* broadly or narrowly, it will not address all of the important antitrust issues raised by Covad. Because Covad is not a reseller like AT&T, it raises claims of denial of essential facilities and extension of monopoly to other downstream markets that differ substantially from the claims raised in *Trinko*, much

as BellSouth tries to blur the distinctions. Covad also raises a price squeeze claim that is not in any way comparable to the claims raised in *Trinko*. There is no reason to delay resolution of Covad's claims to await the outcome of the very different claims at issue in *Trinko*.

If the Court is not going to reach the facilities-based competitor issues squarely framed by Covad's complaint, it should deny outright, not hold, BellSouth's petition.

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Petitioners,

v.

COVAD COMMUNICATIONS COMPANY AND
DIECA COMMUNICATIONS, INC. D/B/A
COVAD COMMUNICATIONS COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Respondent Covad agrees that BellSouth's petition for a writ of certiorari presents issues that "deserve to be resolved by this Court." Covad Resp. at 2-3. Indeed, Covad urges the Court to grant certiorari now and set this case for argument in tandem with *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, No. 02-682. The Court can best determine whether it wishes to grant this case and hear argument on the same day as *Trinko* or whether it would be more efficient to hold this case, decide the *Trinko* case first, and then grant BellSouth's petition if necessary to resolve any remaining issues.

In no event, however, would it be appropriate to deny this petition. Covad concedes that its claims overlap substantially with those presented by the plaintiff in *Trinko*. *See* Covad Resp. at 2-3 ("[b]oth Covad's claims and those presented in *Trinko* conflict with the Seventh Circuit's decision in *Goldwasser*"). At a minimum, therefore, if the Court does not

grant the petition now, it should hold this petition, grant it if necessary to resolve any legal issues that remain after the *Trinko* case is decided, or summarily grant, vacate, and remand the petition if the questions presented are resolved by *Trinko*. *See* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.16, at 255 (8th ed. 2002) ("Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted . . . , the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision.").

CONCLUSION

The Court should grant the petition or, at a minimum, hold it pending the Court's decision in *Trinko*.

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QUESTIONS PRESENTED

1. Does § 2 of the Sherman Act, 15 U.S.C. § 2, require a monopolist to permit access on reasonable terms to an essential facility under its control, where it is feasible for it to permit such access and the monopolist does not establish that it has a legitimate business justification to refuse?

2. Does a monopolist's refusal to deal with a competitor, where its refusal preserves its monopoly power and it does not establish that it has a legitimate business purpose for its refusal, violate § 2 of the Sherman Act, 15 U.S.C. § 2?

3. Does the Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.*, protect incumbent telephone monopolies from application of the antitrust laws, despite its express antitrust savings clause, 47 U.S.C. § 152 (Historical and Statutory Notes), and the harmony between its goals and those of the Sherman Act?

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae Allegiance Telecom, Inc., ATX Communications, Inc., El Paso Networks, L.L.C., Focal Communications Corp., Pac-West Telecomm, Inc., and US LEC Corp. are competitive telephone companies (known as competitive

[1] No one other than the named *amici* wrote this brief in whole or in part, or made any monetary contribution to its preparation. The parties' written consents to the filing of this brief are being filed with the Clerk herewith.

local exchange carriers, or "CLECs") that seek to compete with incumbent monopoly telephone companies ("ILECs") in markets for local telephone service throughout the United States. Some *amici* are currently litigating monopolization claims against ILECs. All *amici*, including those not currently involved in antitrust litigation, have an interest in obtaining a prompt and authoritative judicial determination of the extent to which, and how, § 2 of the Sherman Act governs markets for local telephone service.

As six of the most experienced CLECs in the nation, *amici* compete with, and purchase services from, ILECs, including BellSouth Corporation and Verizon Communications Inc. *Amici* Allegiance Telecom, ATX Communications, Focal Communications, Pac-West Telecomm, and US LEC all serve retail end-users, while El Paso Networks is a wholesale carrier that offers transport and other services to other carriers. Allegiance, Focal, and US LEC were each founded shortly after passage of the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* ("'96 Act"). Today, both Allegiance and Focal operate in markets around the country. US LEC concentrates its operations in the southeast and the mid-Atlantic region. ATX and Pac-West trace their origins to the 1980s and the telecommunications revolution initiated by the break-up of AT&T. ATX operates in the midwest and on the east coast. Pac-West is a regional provider, with operations focused on the west coast. El Paso's network covers most of the metropolitan areas in Texas.

Though each of the *amici* has a different business model, all are facilities-based competitors attempting to compete with historical monopolies. *Amici* have an interest in seeing present uncertainties in relevant antitrust law clarified, so that all parties operating in local telephone service markets understand their competitive rights and obligations and can make business decisions accordingly.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court recently granted certiorari in *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*,305 F.3d 89 (2d Cir. 2002), *cert. granted,* No. 02-682 (Mar. 10, 2003) ("*Trinko*"), which concerns, in part, the application of the antitrust laws to markets for local telephone service. Resolution of the question by this Court is much needed. There are strong disagreements between ILECs and CLECs nationwide, and among the lower courts, about what § 2 of the Sherman Act requires in these markets and even whether it applies at all.

As BellSouth says, this case, *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002) ("*Covad*"), "presents the same important question concerning the scope of an alleged monopolist's duties under Section 2 of the Sherman Act that is raised in . . . *Trinko*." BellSouth Corporation Petition for a Writ of Certiorari at 2, No. 02-1423 ("BellSouth Pet."). This case also provides, however, an important and different perspective on the issues and an enhanced framework, in the form of a highly detailed complaint, for evaluating them. Moreover, given the range of specific issues presented in *Trinko*, there is no assurance that the Court's decision will resolve the ones currently animating myriad disputes. Granting certiorari in this case and consolidating it with *Trinko* for argument would provide the Court with a more robust framework for review of the issues presented, and would ensure that important aspects of the issues are not left unaddressed or reviewed only after a prolonged delay.

The prospects for competition in markets for local telephone service now seem considerably less bright than they did after passage of the '96 Act. At that time, many CLECs entered or significantly expanded their competitive efforts in markets for local telephone service. Much of this was committed entry: CLECs invested $55 billion in telecommunica-

tions infrastructure in the United States. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 516-517 (2002). But today more than 50 CLECs have declared bankruptcy, and of over 300 CLECs in operation in 1999, only about 70 remain. J. Eisenach, *The Real Telecom Scandal*, Wall Street Journal (September 30, 2002). Seven years after passage of the '96 Act, effective competition seems far in the future; ILECs still hold an overwhelmingly dominant position in most local markets. *See* Federal Communications Commission, Local Telephone Competition: Status as of June 30, 2002 at Table 6 (December 2002) (www.fcc.gov/wcb/iatd/comp.html).

While there is more than one cause of this shattered landscape, ILECs have vigorously opposed the advent of competition. Of course, competitors, even monopolists, are encouraged to compete vigorously on the merits. But the conduct of many ILECs in markets for local telephone service reflects their conviction that, because of the '96 Act, they are not subject to antitrust remedies, and that, in any event, the antitrust laws prohibit very little, if any, unilateral conduct. As some *amici* have formally alleged in court filings, they have encountered outright obstruction by ILECs of their efforts to compete in markets for local telephone service. This obstruction has been unreasonable, sustained, and unjustified by legitimate business purposes. Indeed, much of the misconduct—unannounced and unwarranted disruptions of service to CLEC customers, dysfunctional ordering and provisioning systems, opaque and error-laden billing processes—is inefficient for the ILEC as well as for the CLEC. The ILEC's purpose has not been to improve its own operations or make its services more attractive, but to impose disproportionately greater and disabling costs on CLECs in order to preserve the ILEC's monopoly power.

Trinko raises issues about the permissible conduct of monopolists in the context of injured consumers. Consolidating the instant case with *Trinko* would assist the Court in its review of the merits of Trinko's antitrust claim in two ways.

First, since *Trinko* arises on an appeal of a motion to dismiss, there is no evidentiary record in the case, only the bare allegations of the complaint. *Covad* also arises on a motion to dismiss, but the inclusion of a second complaint, one that is highly detailed, in the pleadings before the Court would assist it in evaluating the nature and consequences of the arguments presented.

Second, if the Court reaches the antitrust merits in *Trinko*, as petitioners and its supporting *amici* have urged, its decision will have a direct impact on competition in markets for local telephone service, immediately affecting the business conduct of both ILECs and CLECs. *Covad* provides the CLEC dimension to the "same question" raised in *Trinko*. As it reviews and decides the competitive issues, the Court should augment the complaint in *Trinko* with a parallel case that squarely presents competitors' circumstances, which may be directly affected by *Trinko*'s outcome.

There is also the risk that in *Trinko* the Court may ultimately focus its attention in another direction and never reach the merits of the antitrust claim, since *Trinko* raises a variety of issues. This would leave unresolved the current uncertainty in the courts and in the marketplace about what antitrust limits, if any, govern the ILECs' conduct. All market participants are in need of guidance on these issues from this Court. In addition, a number of antitrust cases pending against ILECs are likely to be delayed during *Trinko*'s pendency, in the hopes that clarification of the applicable principles will issue from the Court. Consolidating this case with *Trinko* would greatly increase the likelihood that the guidance needed by all of the players in local telephone service markets would be more promptly forthcoming from this Court.

BellSouth recognizes that some issues of critical importance to ILECs and CLECs may ultimately be left unresolved in *Trinko*, so it urges a two-step process on the

Court—asking the Court to hold BellSouth's petition pending the decision in *Trinko*, and review this case only if the *Trinko* decision leaves important issues unaddressed. While that process is consistent with the Court's common practice, it would be problematic here. It would leave the prospect that this case, and the guidance it can provide for CLECs and ILECs across the country, might be delayed for two years or more. Alternatively, it would deprive the Court of the benefit of Covad's pleading and the CLEC perspective in the event that it does address all relevant antitrust issues in *Trinko*. Both of these unfortunate outcomes can be avoided by consolidated review of *Covad* and *Trinko*.

In seeking certiorari in *Trinko*, Verizon and *amici* supporting its petition, including both federal antitrust agencies, a coalition of private corporations, and BellSouth—the petitioner here, named the following issue as worthy of the Court's attention, among others:

> (1) the scope of a monopolist's obligation under the Sherman Act to provide access, where feasible, on reasonable terms to an essential facility within its control. Verizon Petition for Writ of Certiorari at 12-18, No. 02-682 ("Verizon Pet."); *Amici Curiae* Brief for United Parcel Service, et al., at 10-16, No. 02-682 ("UPS Brief").

This issue raises the related, more general issue of:

> (2) the scope of a monopolist's obligation under the Sherman Act to do business with a rival, where its refusal to deal preserves monopoly power and it does not demonstrate a legitimate business justification for its conduct. Verizon Pet. at 12, 17; *Amici Curiae* Brief for the United States Department of Justice and the Federal Trade Commission at 11-12, No. 02-682 ("U.S. Brief").

Also presented in the filings in support of certiorari is the question of:

> (3) the relevance of the '96 Act to application of the Sherman Act in markets for local telephone service. Verizon Pet. at 18-21.

All of these issues are present in *Covad*. All are within the scope of the question on which the Court granted certiorari in *Trinko*, *i.e.*, whether the Court of Appeals erred in reversing the District Court's dismissal of Trinko's antitrust claims. As to each of these issues, consolidated consideration of *Covad* and *Trinko* would significantly enhance the factual context provided, thereby enabling fuller analysis by the Court. It would ensure that important open issues are more promptly addressed, and it would permit the Court to assess the issues with representatives of all affected parties before it.

ARGUMENT

1. The centerpiece of Verizon's petition for certiorari in *Trinko* is its multifaceted assault on the essential facilities doctrine. *Covad* raises the "same question," albeit in the context of injured competitors. Yet while *Trinko*'s complaint alleges that CLEC service "requires access" to local telephone infrastructure, the complaint alleges the elements of an essential facilities claim only in general terms. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983). It gives the defendant notice of the antitrust claim against it (Verizon does not contend otherwise), but it provides a skeletal framework for the Court's first review of essential facilities issues since 1912. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). Verizon criticizes *Trinko*'s complaint as too conclusory, and there is no other record in the case.

Thus, while Verizon and BellSouth seek to have this Court address critical issues of antitrust doctrine, they ask the Court to do so on a very limited set of facts. The Court should

decline the invitation to provide an authoritative delineation of the dimensions of the essential facilities doctrine, with direct effects for competitors, solely on the basis of *Trinko*'s consumer complaint.

Considering Covad's complaint at the same time that it considers Trinko's would provide the Court with a considerably augmented factual context for the issues presented. Covad offers detailed, specific allegations about its need for access to the local telephone networks controlled by an ILEC, the feasibility of permitting access, and how Covad has been denied reasonable access. It also details the consequences of that denial for a business attempting to provide innovative competition. Consolidated review of the *Trinko* and *Covad* cases would provide a meaningful framework for the Court's analysis of essential facilities principles. It would enable the Court to examine the relevant competitive issues with representatives of both competitors and consumers before it.

Amici agree with Verizon and BellSouth that Court review of the essential facilities doctrine is in order. The doctrine is raised in an increasing number of consumer and competitor antitrust claims against the ILECs, with inconsistent results in courts across the country. Moreover, dramatically disparate understandings of relevant law are continuing to create uncertainties and conflicts in the business relationships between ILECs and CLECs across the country, giving rise to additional disputes.

As Verizon and BellSouth emphasize, the essential facilities doctrine has not been embraced by this Court. It has, however, been adopted by every circuit. *See, e.g., Interface Group, Inc. v. Massachusetts Port Authority,* 816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.,* 902 F.2d 174, 179 (2d Cir. 1990); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.,* 90 F.3d 737, 748 (3rd Cir. 1996); *Advanced Health Care Servs. v. Radford Community Hosp.,* 910 F.2d 139, 150 (4th Cir. 1990); *Mid-*

Texas Communications Sys., Inc., v. American Tel. & Tel. Co., 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI v. AT&T,* 708 F.2d at 1132-33 (7th Cir.); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds,* 472 U.S. 585 (1985); *Covad v. BellSouth*, 299 F.3d at 1285 (11th Cir.); *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-58 (Fed. Cir. 1999). *See generally*, R. Pitofsky, D. Patterson, and J. Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law,* 70 Antitrust L.J. 443 (2002).

Local telephone infrastructure has long been considered the textbook example of an essential facility. *See, e.g., Southern Pac. Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 980 (D.C. Cir. 1984); *MCI v. AT&T,* 708 F.2d at 1132-33. As this Court recently observed, "[i]t is easy to see why a company that owns a local exchange (what the Act calls an 'incumbent local exchange carrier,' 47 U.S.C. § 251(h)), would have an almost insurmountable competitive advantage . . . . A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the 'last mile' of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses." *Verizon Communications Inc. v. FCC,* 535 U.S. at 490.

a. Verizon raises a number of arguments against the essential facilities doctrine, some that attack the doctrine directly, and some that would leave it standing in the abstract,

but not meaningfully applicable in any real-world circumstances. BellSouth's petition echoes many of these arguments. Verizon and BellSouth would have the Court address their far-reaching contentions in the constricted context of Trinko's consumer complaint, which lays little groundwork for the inquiries they propose.

For example, Verizon contends that while the essential facilities doctrine may sometimes mandate access, any access at all, no matter how unreasonably conditioned, is sufficient. Verizon Pet. at 13-14. BellSouth raises the same argument. BellSouth Pet. at 15-16. In their view, a monopolist can satisfy its obligation by providing access that is so unreasonably limited that it affords no opening for meaningful competition. Adoption of this position would, of course, frustrate the purpose of the essential facilities doctrine, which is to promote competition.

The ILECs' argument conflicts with considerable precedent that holds, not surprisingly, that where the essential facilities doctrine applies, it requires access to be made available on reasonable terms that provide an opportunity for meaningful competition. *See, e.g., Fishman v. Estate of Wirtz*, 807 F.2d 520, 541 (7th Cir. 1986) ("[a]greeing to deal on unreasonable terms is merely a type of refusal to deal."). *See also City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 648 (10th Cir. 1990), *overruled on other grounds*, *Systemcare Inc. v. Wang Labs. Corp.*, 117 F.3d 1137 (10th Cir. 1997) (plaintiff must show that the defendant "did not provide access to its pipeline on reasonable terms, equivalent to a denial of access"); *Alaska Airlines, Inc. v. United Airlines*, 948 F.2d 536, 542 (9th Cir. 1991) ("the essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first"); *Laurel Sand & Gravel, Inc. v. CSX Trans. Inc.*, 924 F.2d 539, 545 (4th Cir.

1991) (applying the "reasonable standard of the access factor"); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d at 179-80 ("there need not be an outright refusal to deal in order to find . . . denial of an essential facility . . . . [i]t is sufficient if the terms of the offer to deal are unreasonable.").

Not surprisingly, Trinko, as a consumer and not a competitor in telephone service markets, does not in its complaint describe at length the extent to which and precisely how Verizon denied access to its CLEC supplier. Thus, *Trinko* is a particularly inappropriate vehicle for this Court to utilize in evaluating the extent of access required by the essential facilities doctrine. Since it relates to a competitor case, Covad's complaint provides significantly more detail, describing how reasonable access has been denied in a number of different specific circumstances. Consolidation of *Covad* with *Trinko* would provide the Court with an enhanced framework within which to address the ILECs' argument.

b. Verizon also contends that the essential facilities doctrine cannot force a monopolist to enter a new line of business. Verizon Pet. at 13-14. If it has not sold services at wholesale in the past, it cannot be compelled to begin, even if its denial of access preserves its monopoly power and it has no legitimate business justification for the refusal. BellSouth makes the same argument. BellSouth Pet. at 14. Of course, while this approach would pretend to leave essential facilities principles in place as a matter of doctrine, in most circumstances there would be no remedy for their violation. The doctrine would effectively be wiped off the books.

The ILECs' argument is based on the assumption that ILECs did not sell wholesale services prior to the adoption of the '96 Act. Certainly after that Act was passed, new regulations and practices came into play, but ILECs have sold services at wholesale to long-distance carriers ever since

the breakup of AT&T in 1983. In addition to its questionable factual basis, this argument involves fundamental issues about the scope of antitrust law and the courts' remedial powers.

Trinko's complaint provides only a very limited glimpse of the issues arising under Verizon's and BellSouth's argument. While Covad's complaint also provides limited insight into the contention, it lays out the nature of the local network and the services currently sold in a more detailed way, and would assist the Court in evaluating this argument.

c. Verizon argues as well that the essential facilities doctrine cannot require it to permit a competitor to "occupy" and have "exclusive" use of its premises. Verizon Pet. at 14. BellSouth echoes this contention. BellSouth Pet. at 6. Of course, a right of access, if exercised, necessitates at least a temporary presence. If a competitor cannot enter an essential facility, it can hardly be said to have access to it. And if a competitor cannot temporarily lease lines from the local telephone network, at the behest of a customer that has chosen to do business with the competitor, the competitor cannot be said to have meaningful access to the network. Again, Verizon's and BellSouth's argument would purport to leave the essential facilities doctrine in place while removing any remedy for its violation.

Surrendering *exclusive* access—that is, allowing some access—is what the essential facilities doctrine is about. A monopolist may not unreasonably exclude competitors from its facility in order to prevent them from competing against it. *MCI v. AT&T*, 708 F.2d at 1132-33. When Verizon allows a CLEC access to the local telephone network for the purpose of serving a customer that has chosen to do business with the CLEC, Verizon does not, as it asserts, "abandon" those facilities. Verizon continues to own, occupy, and use the local network. And should the customer decide to switch to

Verizon service, Verizon utilizes those facilities to provide the customer with service.

Again, having the *Covad* complaint before it would assist the Court in evaluating the ILECs' argument. As a consumer, Trinko in its complaint does not provide details that would inform an analysis of the type of access necessary if the essential facilities doctrine is to provide a meaningful remedy for monopolization. Covad's complaint offers far more in the way of description of the network, the nature of the use involved in CLEC leasing of elements of the network, and the ways in which reasonable access to the network is necessary in order for a CLEC to compete.

2. The essential facilities doctrine is closely related to precedent on anticompetitive refusals to deal. Verizon Pet. at 11; U.S. Brief at 11-12; BellSouth Pet. at 6. Like the cases considering the essential facilities doctrine, these decisions address a monopolist's refusal to do business with a competitor. Unlike the essential facilities doctrine, however, refusal-to-deal precedent focuses not on whether the monopolist controls a facility to which access is essential for competition, but on the related albeit more fundamental issue of the competitive effects of the monopolist's conduct. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). The issue is whether the monopolist's conduct preserves its market power. *See Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (refusal to deal with customer that is also doing business with a competitor).

The analysis in these cases recognizes that in a competitive market, sellers generally seek out as much business as they can find. Where a refusal to do business preserves monopoly power, therefore, it warrants careful scrutiny. *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.) ("The monopoly supplier who retaliates against customers who have the temerity to

compete with him, by cutting such customers off, is severing a collateral relationship in order to discourage competition.").

Refusal-to-deal precedent also expressly incorporates the business justification defense emphasized in the U.S. Brief, although this defense has been a part of most § 2 litigation of all types in recent years. For example, Trinko expressly alleges the absence of a legitimate business justification for Verizon's conduct, although the existence of a legitimate business justification is a defense and need not be affirmatively alleged in a complaint.

Careful consideration of the essential facilities doctrine will require attention to closely related precedent on monopolistic refusals to deal. Again, Covad's complaint would add context useful for the Court's analysis.

3. Underlying Verizon's *Trinko* petition is the contention that conduct that violates the '96 Act cannot also violate § 2 of the Sherman Act. The argument also appears in BellSouth's petition in this case. BellSouth Pet. at 17-19. It is supported by language in the Seventh Circuit's decision in *Goldwasser v. Ameritech Corp.*, cited with approval by both Verizon and BellSouth. 222 F.3d 390 (7th Cir. 2000). The notion is that even if the anticompetitive conduct alleged by Trinko and Covad would violate § 2, that statute does not apply because there is in place a regulatory scheme designed to encourage competition.

This argument conflicts with a long line of precedent applying the antitrust laws even to highly regulated industries. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) (electricity); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963) (banking); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966) (shipping); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (securities); *United States v. RCA*, 358 U.S. 334 (1959) (broadcasting); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (agriculture);

Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 349 F. Supp. 1064, 1068 (D. Haw. 1972) (air travel). If the existence of a regulatory scheme precluded application of the antitrust laws, they would govern very little of the nation's commerce.

Thus, regulatory and antitrust regimes often overlap. *See, e.g., Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 729 (9th Cir. 1981) (Kennedy, J.) ("[a]ntitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct. There is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry.")

Moreover, the '96 Act contains an express antitrust savings clause. 47 U.S.C. § 152 (Historical and Statutory Notes). Verizon's and BellSouth's contentions that the '96 Act weakens or eliminates antitrust jurisdiction over their conduct cannot be reconciled with this provision.

Even without the provision, the '96 Act would not be read to repeal § 2 by implication in the absence of "plain repugnancy" between that statute and the Sherman Act. *Philadelphia Nat'l Bank*, 374 U.S. at 351. The plain repugnancy test is based on the bedrock principle of statutory construction that, wherever possible, statutes should be read to complement rather than conflict with one another. *OXY USA v. Babbitt*, 122 F.3d 251, 258 (5th Cir. 1997). One statute's repeal of another is to be implied only where necessary to make both statutes work, and even then, only to the extent necessary. *Silver v. New York Stock Exch.*, 373 U.S. at 357.

The '96 Act and the Sherman Act have largely parallel purposes, namely the promotion of competition for the benefit of consumers. The '96 Act is intended to encourage competition in both local and long-distance telephone service markets by allowing incumbent local firms to offer long-

distance service if they interconnect with competitive local firms in certain enumerated ways. 47 U.S.C. §§ 251(c), 252, 271. The Sherman Act is a "comprehensive charter of economic liberty," *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958), which bars the maintenance of monopoly power through exclusionary conduct of any kind. 15 U.S.C. § 2; *United States v. Microsoft Corp.*, 253 F.3d 34, 64 (D.C. Cir. 2001) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

Despite the statutory savings clause and well-established principles of statutory interpretation, *Trinko* raises the issue, echoed in *Covad*, of the applicability of § 2 to local telephone service markets. This issue is well within the confines of the question on which certiorari was granted in *Trinko*. Again, consolidating *Covad* with *Trinko* for argument would provide useful additional context for the Court's review of the issue and would ensure that important aspects of the issue are not left unaddressed. This Court's determination of the issue would provide much-needed guidance to competitors and consumers participating in these markets.

CONCLUSION

The petition for a writ of certiorari should be granted and this case consolidated for argument with *Trinko*.

Respectfully submitted,

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